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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Access Charge Reform)	CC Docket No. <u>96-262</u>
)	
Reform of Access Charges Imposed by)	
Competitive Local Exchange Carriers)	
)	
Petition of Z-Tel Communications, Inc.)	CCB/CPD File No. 01-19
For Temporary Waiver of Commission Rule)	
61.26(d) to Facilitate Deployment of Competitive)	
Service in Certain)	
Metropolitan Statistical Areas)	

EIGHTH REPORT AND ORDER AND FIFTH ORDER ON RECONSIDERATION

Adopted: May 13, 2004

Released: May 18, 2004

By the Commission: Chairman Powell issuing a statement.

Table of Contents

	Paragraph
I. Introduction	1
II. Background	2
III. Order on Reconsideration	10
A. Accounting for Services Still Provided by the Incumbent LEC	10
B. The CLEC New Markets Rule	22
C. Rural Exemption	33
D. Structure of the Benchmark	42
E. Multiple Incumbent LECs in a Service Area	46
F. Billing Name Information	49
G. Other Matters	51
IV. Eighth Report and Order	64
A. Background	64
B. Discussion	69

V.	Procedural Matters	73
VI.	Ordering Clauses.....	136
Appendix A -- Final Rules		
Appendix B -- Petitions for Reconsideration and/or Clarification		
Appendix C -- Petition of Z-Tel for Temporary Waiver		
Appendix D -- Comments and Reply Comments Re Access Rates for 8YY Traffic		

I. INTRODUCTION

1. As part of its effort to establish a pro-competitive, deregulatory national policy framework for the United States telecommunications industry, the Commission, in the *CLEC Access Reform Order*, adopted a new regulatory regime for interstate switched access services provided by competitive local exchange carriers (competitive LECs) to interexchange carriers (IXCs).¹ Specifically, the Commission limited to a declining benchmark the amounts that competitive LECs may tariff for interstate access services, restricted the interstate access rates of competitive LECs entering new markets to the rates of the competing incumbent local exchange carrier (incumbent LEC), and established a rural exemption permitting qualifying carriers to charge rates above the benchmark for their interstate access services.² In this Fifth Order on Reconsideration, we resolve seven petitions for clarification and/or reconsideration of the *CLEC Access Reform Order*.³ As explained in further detail below, we clarify certain aspects of the *CLEC Access Reform Order* and deny the petitions for reconsideration.⁴ We also address and deny a pending petition seeking a temporary waiver of section 61.26(d) of the Commission's rules.⁵ In the Eighth Report and Order, we decline to set a separate access rate for originating 8YY

¹ See *In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001) (*CLEC Access Reform Order*).

² See generally *id.*

³ A complete list of the pleadings filed is contained in Appendix B.

⁴ In addition to the petitions for clarification and/or reconsideration, several parties requested that the Commission stay the *CLEC Access Reform Order* pending reconsideration or judicial review. See Mpower Communications Corp. and North County Communications, Inc., *In the Matter of Access Charge Reform*, CC Docket No. 96-262, Emergency Petition for Stay of Order, June 18, 2001 (Mpower Petition for Stay); TDS Metrocom, Inc., *In the Matter of Access Charge Reform*, CC Docket No. 96-262, Petition for Stay Pending Reconsideration, June 28, 2001 (TDS Petition for Stay); Letter from Jonathan E. Canis, Counsel to Business Telecom, Inc. *et al.*, to Magalie R. Salas, Secretary, Federal Communications Commission, CC Docket No. 96-262 (filed May 25, 2001) (requesting that the Commission stay the effective date of the *CLEC Access Reform Order* on its own motion) (Joint CLEC May 25 *Ex Parte*). After the Commission did not act on the request for a stay, Mpower and North County sought a stay from the D.C. Circuit Court of Appeals. On June 28, 2001, the D.C. Circuit denied the request for a stay. See *Mpower Communications Corp., et al. v. FCC*, No. 01-1280, Order dated June 28, 2001. We now deny as moot the Mpower Petition for Stay.

⁵ See *In the Matter of Petition of Z-Tel Communications, Inc. and Z-Tel Communications of Virginia, Inc. for Temporary Waiver of Commission Rule 61.26(d) to Facilitate Deployment of Competitive Services in Certain Metropolitan Statistical Areas*, filed Aug. 3, 2001 (Z-Tel Waiver Petition).

traffic and allow it to be governed by the same declining benchmark as other competitive LEC interstate access traffic.

II. BACKGROUND

2. In the *CLEC Access Reform Order*, the Commission addressed a variety of issues arising from market disputes between IXCs and competitive LECs over the level of competitive LEC interstate access rates.⁶ The Commission observed that competitive LEC access rates varied dramatically, and that access rate disputes between IXCs and competitive LECs created significant financial uncertainty for both groups of carriers.⁷ Moreover, the Commission found that carrier disputes appeared likely to threaten network ubiquity, a result that the Commission concluded could have significant public safety ramifications.⁸ In order to ensure that competitive LEC access rates are just and reasonable, the Commission sought to eliminate regulatory arbitrage opportunities that previously existed with respect to tariffed competitive LEC access services.⁹

3. The Commission concluded that the market structure for access services prevented competition from effectively disciplining prices.¹⁰ It explained that an IXC has no competitive alternative for access to a particular end-user and, because the IXC pays for access charges and recovers those costs through averaged rates, the end-user has no incentive to avoid high-priced providers for access services.¹¹ The Commission found that certain competitive LECs used the tariff system to set access rates that were subject neither to negotiation nor to regulation designed to ensure their reasonableness, and then relied on their tariff to demand payment from IXCs for access services that the long distance carriers likely would have declined to purchase at the tariffed rate.¹²

4. To address this market failure, the Commission revised its tariff rules to align tariffed competitive LEC access rates more closely with those of the incumbent LECs.¹³ The Commission set a benchmark rate for competitive LEC access rates and concluded that competitive LEC access rates at or below the benchmark would be presumed just and reasonable.¹⁴ Under the rules the Commission adopted, a competitive LEC may not tariff interstate access charges above the higher of (1) the competing incumbent LEC rate, or (2) the benchmark rate or the lowest rate the competitive LEC tariffed for interstate access service within the six months preceding the effective date of the order, whichever is

⁶ For a more detailed background, see *CLEC Access Reform Order*, 16 FCC Rcd at 9926-30, paras. 8-20.

⁷ *Id.* at 9931-32, paras. 22-23.

⁸ *Id.* at 9932-33, para. 24.

⁹ See *id.* at 9924-25, paras. 2-3. The Commission limited its application of the tariff rules to competitive LEC interstate access services (defined only as interstate switched access services unless otherwise specified to the contrary). *Id.* at 9924, para. 2 & n.2.

¹⁰ *Id.* at 9936, para. 32.

¹¹ *Id.* at 9935, para. 31.

¹² *Id.* at 9925, para. 2.

¹³ See 47 C.F.R. § 61.26.

¹⁴ *CLEC Access Reform Order*, 16 FCC Rcd at 9925, para. 3.

lower.¹⁵ Competitive LEC access charges above the benchmark (or above the competing incumbent LEC rate, if it is higher) are mandatorily detariffed and may be imposed only pursuant to a negotiated agreement.¹⁶ During the pendency of negotiations, or if the parties cannot agree, the competitive LEC must charge the IXC the appropriate benchmark rate.¹⁷ The Commission also concluded that an IXC would violate section 201(a) of the Act by refusing to complete a call to, or accept a call from, an end-user served by a competitive LEC charging rates at or below the benchmark.¹⁸

5. In order to avoid too great a disruption for competitive carriers, the Commission implemented the benchmark in a way that allows competitive LEC rates to decrease over time until they reach the rate charged by the competing incumbent LEC.¹⁹ The benchmark was set at 2.5 cents per minute for the first year after the *CLEC Access Reform Order* became effective, and moved to 1.8 and 1.2 cents per minute in the second and third years, respectively.²⁰ At the end of the third year, the rate will parallel the access rate charged by the competing incumbent LEC.²¹ Additionally, the Commission ruled that competitive LECs may tariff the benchmark rate only for service in the Metropolitan Statistical Areas (MSAs) where they were serving customers on June 20, 2001, the effective date of the new rules.²² In those MSAs where a competitive LEC initiates service after the effective date of the order, it may not tariff a rate higher than the applicable incumbent LEC rate (the "CLEC new markets rule").²³

6. The Commission also adopted a rural exemption to the benchmark regime. The exemption is available for a competitive LEC that competes with a non-rural incumbent LEC, where no portion of the competitive LEC's service area falls within: (1) any incorporated place of 50,000 inhabitants or more, based on the most recently available population statistics of the Census Bureau or (2) an urbanized area, as defined by the Census Bureau.²⁴ If a competitive LEC originates traffic from or terminates traffic to end-users located within either of these two types of areas, the carrier is ineligible for the rural exemption to the benchmark rule.²⁵ In recognition of the substantially higher loop costs incurred by competitive LECs in rural areas, competitive LECs qualifying for the rural exemption are permitted to tariff rates up to the highest rate band in the National Exchange Carriers Association (NECA) tariff, minus the NECA tariff's carrier common line (CCL) charge.²⁶

¹⁵ 47 C.F.R. § 61.26(b).

¹⁶ *CLEC Access Reform Order*, 16 FCC Rcd at 9925, para. 3.

¹⁷ *Id.*

¹⁸ *Id.* at 9960-61, para. 94.

¹⁹ *Id.* at 9944-45, para. 52.

²⁰ 47 C.F.R. § 61.26(c).

²¹ *Id.*

²² *CLEC Access Reform Order*, 16 FCC Rcd at 9947, para. 58.

²³ 47 C.F.R. § 61.26(d).

²⁴ 47 C.F.R. § 61.26(a)(6), (e).

²⁵ *Id.* See also *CLEC Access Reform Order*, 16 FCC Rcd at 9954, para. 76.

²⁶ 47 C.F.R. § 62.26(e).

7. Seven parties petitioned for reconsideration or clarification of the *CLEC Access Reform Order*, and various parties filed oppositions, comments, and replies.²⁷ The petitioners challenge the validity of the CLEC new markets rule, the structure of the benchmark, and the transition period.²⁸ Further, the petitioners seek clarification regarding what access rates apply when more than one incumbent LEC operates within the competitive LEC's service area.²⁹ Another petitioner asks the Commission to clarify that a competitive LEC may charge only the portion of the benchmark rate that reflects the access services actually provided.³⁰ Several petitioners also challenge various aspects of the rural exemption. These challenges include arguments to expand the scope of the rural exemption, to make the rural benchmark available to competitive LECs entering new areas, and to add the carrier common line (CCL) charge as well as the multi-line business pre-subscribed interexchange carrier charge (PICC) to the rural exemption rate.³¹ Finally, certain petitioners request clarification or reconsideration regarding several other issues, including requirements under sections 201(a), 202(a), 203(c), and 214 of the Communications Act.³²

8. In a Further Notice of Proposed Rulemaking that accompanied the *CLEC Access Reform Order*, the Commission sought additional comment on whether access rates for originating toll-free, or 8YY, traffic should immediately be moved to the competing incumbent LEC rate, rather than following the declining benchmark over three years.³³ As discussed in more detail below, several parties commented on this issue.

9. For the reasons discussed below, we deny petitions for reconsideration of the *CLEC Access Reform Order* but address several issues raised in petitions for clarification. Specifically, we clarify that a competitive LEC is entitled to charge the full benchmark rate if it provides an IXC with access to the competitive LEC's own end-users. We also find that the rate a competitive LEC charges for access components when it is not serving the end-user should be no higher than the rate charged by the competing incumbent LEC for the same functions, and we amend our rules in accordance with this finding. We further clarify that any PICC imposed by a competitive LEC qualifying for the rural exemption may be assessed in addition to the rural benchmark rate if and only to the extent that the competing incumbent LEC charges a PICC. In addition, we identify permissible ways in which competitive LECs may structure their rates if they serve a geographic area with more than one incumbent LEC. We also clarify the source of our authority to impose IXC interconnection obligations under

²⁷ See Appendix B for a complete list of pleadings filed. Both competitive LECs and IXCs have sought review of the *CLEC Access Reform Order* in the D.C. Circuit. See *AT&T Corp. v. FCC*, Case No. 01-1244 (filed May 31, 2001); *Sprint Corp. v. FCC*, Case No. 01-1263 (filed June 11, 2001); *Mpower Communications Corp. & North County Communications, Inc. v. FCC*, Case No. 01-1280 (filed June 22, 2001). The cases were consolidated and the court is holding the petitions for review in abeyance pending the Commission's completion of this reconsideration proceeding. See *AT&T Corp. v. FCC*, Case Nos. 01-1244, 01-1263, and 01-1280, Order (D.C. Cir. Jan. 8, 2002)(granting the Commission's motion to hold the appeals in abeyance).

²⁸ See Focal Petition at 2-6; TDS Petition at 7-9; Time Warner Petition at 2-9.

²⁹ See TelePacific Petition at 1-3.

³⁰ See Qwest Petition at 2-4.

³¹ See MCLEC Petition at 2-14; RICA Petition at 3-12.

³² See Qwest Petition at 4-6; RICA Petition at 12-15; RICA Reply at 8-9.

³³ See *CLEC Access Reform Order*, 16 FCC Rcd at 9962-64, paras. 99-104.

section 201(a) and we deny a pending petition for waiver of the CLEC new markets rule. Finally, we decline to set a separate access rate for originating 8YY traffic and allow it to be governed by the same declining benchmark as other competitive LEC interstate access traffic.

III. ORDER ON RECONSIDERATION

A. Accounting for Services Still Provided by the Incumbent LEC

10. Qwest asks the Commission to clarify the rules to ensure that a competitive LEC charges only the portion of the competing incumbent LEC rate that reflects the services that the carrier actually provides.³⁴ Qwest emphasizes that the competitive LEC's tariffed rate should exclude the amounts paid for access services necessary to connect an IXC to an end-user that are not provided by the competitive LEC.³⁵ Thus, when one or more of the services necessary to originate or terminate an interexchange call is provided by a carrier other than the competitive LEC, Qwest suggests that the benchmark rate should be correspondingly reduced.³⁶ For instance, Qwest argues that where the incumbent LEC still provides tandem switching, the IXC should have to pay that charge to the incumbent LEC only, and not to both the incumbent LEC and the competitive LEC.³⁷

11. ALTS opposes the requested clarification, arguing that Qwest's characterization of the services Qwest receives and for which it pays is incorrect.³⁸ According to ALTS, IXCs that exchange traffic with competitive LECs through the incumbent LEC tandem receive a service from both the incumbent LEC and the competitive LEC, and, accordingly, it is appropriate for both the competitive LEC and the incumbent LEC to bill such IXCs.³⁹ ALTS asserts that an IXC can avoid paying for incumbent LEC services by interconnecting directly with a competitive LEC, thereby bypassing the incumbent LEC network altogether.⁴⁰

12. ASCENT and Focal center their opposition on the administrative burden they allege would result from Qwest's proposed clarification.⁴¹ ASCENT argues that, as a policy matter, the Commission left competitive LECs with maximum flexibility to structure their charges as long as they did not "exceed a benchmark ultimately reflective of incumbent LEC charges," and that removing an

³⁴ Qwest Petition at 2-4.

³⁵ *Id.* at 2.

³⁶ *Id.* at 3.

³⁷ *Id.*

³⁸ ALTS Comments at 12.

³⁹ *Id.* See also ASCENT Reply at 4-5.

⁴⁰ ALTS Comments at 12. See also Letter from Richard M. Rindler, Counsel for US LEC Corp., to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 96-262 and 01-92, filed Aug. 25, 2003 at 5-6 (US LEC Aug. 25 *Ex Parte* Letter).

⁴¹ See, e.g., Focal Comments at 7 (asserting that Qwest's request would "vitalize the benchmark as a simple, easy-to-administer guide identifying when CLEC access charges will be presumed reasonable").

access component from competitive LEC rates would be inconsistent with the Commission's intent.⁴² Similarly, Focal argues that requiring the change advocated by Qwest "would essentially transform the benchmark from an overall measure of the reasonableness of a CLECs' rates that affords CLECs flexibility in setting rate structures, to a rate and rate structure prescription."⁴³ Z-Tel interprets Qwest's request as a requirement that competitive LECs mirror incumbent LEC access tariff elements, and it argues that such a requirement would be inappropriate because this may not accurately reflect how a competitive LEC's costs are incurred.⁴⁴ Z-Tel further argues that, particularly for UNE-P providers, Qwest's proposal may prevent competitive LECs from recovering their costs. Z-Tel explains that, because the per-minute and per-port components of UNE rates are determined by state commissions, and not necessarily in conjunction with this Commission's review of the same incumbent LEC's interstate tariff, it is possible that the cost of providing a minute of access over the UNE platform could exceed the per-minute interstate access rate for the same incumbent LEC.⁴⁵

13. We deny Qwest's request for clarification that the full benchmark rate is not available in situations when a competitive LEC does not provide the entire connection between the end-user and the IXC. Under section 61.26(b) of the Commission's rules, a competitive LEC's tariffed rate for "its interstate switched exchange access services" cannot exceed the benchmark.⁴⁶ Under section 61.26(a)(3), the term interstate switched exchange access services "shall include the functional equivalent of the ILEC interstate exchange access services typically associated with the following rate elements: carrier common line (originating); carrier common line (terminating); local end office switching; interconnection charge; information surcharge; tandem switched transport termination (fixed); tandem switched transport facility (per mile); tandem switching."⁴⁷ The rate elements identified in section 61.26(a)(3) reflect those services needed to originate or terminate a call to a LEC's end-user. When a competitive LEC originates or terminates traffic to its own end-users, it is providing the functional equivalent of those services, even if the call is routed from the competitive LEC to the IXC through an incumbent LEC tandem. Consequently, because there may be situations when a competitive LEC does not provide the entire connection between the end-user and the IXC, but is nevertheless providing the functional equivalent of the incumbent LEC's interstate exchange access services, we deny Qwest's petition.⁴⁸

⁴² ASCENT Comments at 4. See also US LEC Aug. 25 *Ex Parte* Letter at 4, 6 (stating that the Commission's intent was to maintain rate structure flexibility for competitive LECs and to require only that the competing LEC's rate not exceed the benchmark).

⁴³ Focal Comments at 7.

⁴⁴ Z-Tel Opposition at 6.

⁴⁵ *Id.* at 6.

⁴⁶ 47 C.F.R. § 61.26(b).

⁴⁷ 47 C.F.R. § 61.26(a)(3).

⁴⁸ IXCs argue that paragraph 55 of the *CLEC Access Reform Order* could be read to suggest that the Commission intended the benchmark to be available only when the competitive LEC provided the full connection between the IXC and the end-user. See AT&T Opposition at 19; Letter from Robert J. Aarnoth and Jennifer M. Kashatus, Counsel for ITC DeltaCom Communications, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 96-262 and 01-92, at 2 (filed Sept. 11, 2003). We find that this is not the best reading of paragraph 55. When read in conjunction with the definition contained in section 61.26(a)(3), we think the two lists of elements described in paragraph 55 were intended to illustrate what might be (continued....)

14. Although we deny Qwest's petition, we also reject the argument made by some competitive LECs that they should be permitted to charge the full benchmark rate when they provide any component of the interstate switched access services used in connecting an end-user to an IXC.⁴⁹ The approach advocated by these competitive LECs, in which rates are not tethered to the provision of particular services, would be an invitation to abuse because it would enable multiple competitive LECs to impose the full benchmark rate on a single call. It also would enable competitive LECs to discriminate among IXCs by providing varying levels of service for the same price.⁵⁰ As the Supreme Court clearly has stated, rates "do not exist in isolation. They have meaning only when one knows the services to which they are attached."⁵¹

15. Through pleadings in this proceeding, as well as a petition for declaratory ruling filed by US LEC,⁵² the Commission is aware that there have been a number of disputes regarding the appropriate compensation to be paid by IXCs when a competitive LEC handles interexchange traffic that is not originated or terminated by the competitive LEC's own end-users. Because neither the *CLEC Access Reform Order* nor other applicable precedent addressed the appropriate rate in this scenario, we now conclude that the benchmark rate established in the *CLEC Access Reform Order* is available only when a competitive LEC provides an IXC with access to the competitive LEC's own end-users. As explained above, a competitive LEC that provides access to its own end-users is providing the functional equivalent of the services associated with the rate elements listed in section 61.26(a)(3) and therefore is entitled to the full benchmark rate.

16. Some competitive LECs argue that they should be entitled to collect the full benchmark rate, even when they do not serve the end-user, if they enter into a joint billing arrangement with the carrier that does serve the end-user.⁵³ We acknowledge that there are situations where a competitive LEC

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considered the "functional equivalent" of incumbent LEC access services, rather than mandating the provision of a particular set of services.

⁴⁹ US LEC, for example, argues that a competitive LEC may charge the maximum benchmark rate even where that competitive LEC provides only some portion of the transport component of the switched access service, leaving other carriers to provide the bulk of the service, including (i) the connection between the caller and the local switch, (ii) end office switching, as well as, possibly, (iii) additional tandem-switched transport. See Letter from Patrick J. Donovan, Counsel for US LEC Corp., to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 96-262 and 01-92 (filed April 29, 2003); see also *TelePacific Sept. 25 Ex Parte* Letter at 3 (arguing that the *CLEC Access Reform Order* permits competitive LECs to charge the benchmark rate for the access services they provide to IXCs regardless of the access functions or rate structure).

⁵⁰ Although unreasonable discrimination often takes the form of different pricing for the same service, the Supreme Court has made clear that providing different levels of service for the same tariffed price may be equally unreasonable. See *AT&T v. Central Office Telephone*, 524 U.S. 214, 223 (1998) ("An unreasonable 'discrimination in charges,' that is, can come in the form of a lower price for an equivalent service or in the form of an enhanced service for an equivalent price.").

⁵¹ *Id.*

⁵² See *Comment Sought on Petitions for Declaratory Ruling Regarding Inter-carrier Compensation for Wireless Traffic*, CC Docket No. 01-92, Public Notice, DA 02-2436 (rel. Sept. 30, 2002) (seeking comment on a petition for declaratory ruling filed by US LEC).

⁵³ See, e.g., White Paper on CMRS/CLEC Inter-carrier Compensation, attached to Letter from Kathryn A. Zachem, Counsel for Verizon Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 96-262 and 01-92, at 5-6 (filed Jan. 16, 2004) (Verizon Wireless White Paper); Letter from Patrick J. Donovan, Counsel for US LEC Corp., to Marlene H. Dortch, Secretary, Federal Communications Commission (continued....)

may bill an IXC on behalf of itself and another carrier for jointly provided access services pursuant to meet point billing methods.⁵⁴ We note, however, that the validity of these joint billing arrangements is premised on each carrier that is party to the arrangement billing only what it is entitled to collect from the IXC for the service it provides.⁵⁵ In cases where the carrier serving the end-user had no independent right to collect from the IXC, industry billing guidelines do not, and cannot, bestow on a LEC the right to collect charges on behalf of that carrier. For example, the Commission has held that a CMRS carrier is entitled to collect access charges from an IXC only pursuant to a contract with that IXC.⁵⁶ If a CMRS carrier has no contract with an IXC, it follows that a competitive LEC has no right to collect access charges for the portion of the service provided by the CMRS provider.⁵⁷

17. Because of the many disputes related to the rates charged by competitive LECs when they act as intermediate carriers, we conclude that it is necessary to adopt a new rule to address these situations. Specifically, we find that the rate that a competitive LEC charges for access components when it is not serving the end-user should be no higher than the rate charged by the competing incumbent LEC for the same functions.⁵⁸ We conclude that regulation of these rates is necessary for the all the

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Commission, CC Docket Nos. 96-262 and 01-92, filed Aug. 25, 2003 at 6-7 (stating that US LEC may utilize meet point billing arrangements with the CMRS provider to jointly provision access service to the wireless end-user and that it is entitled to the benchmark rate).

⁵⁴ See *In the Matter of Access Billing Requirements for Joint Service Provision*, CC Docket No. 87-579, Phase II, Order, 65 Rad. Reg. 2d 650, paras. 2-5 (1988), applications for review denied, 4 FCC Rcd 7914 (1989). Indeed, the industry has developed standards, i.e., the Multiple Exchange Carrier Access Billing Standard ("MECAB"), to govern meet point billing arrangements, and the Commission has required LECs to follow the MECAB standards. See, e.g., *In the Matter of Waiver of Access Billing Requirements and Investigation of Permanent Modifications*, CC Docket No. 87-579, Memorandum Opinion and Order, 3 FCC Rcd 13, 16-17, paras. 29-31 (1987) (subsequent history omitted).

⁵⁵ See, e.g., *In the Matter of Access Billing Requirements for Joint Service Provision*, CC Docket No. 87-579, Phase II, Order, 65 Rad. Reg. 2d 650, para. 87 (1988) ("We therefore conclude that those LECs whose current tariff provisions would allow a LEC to impose [termination] charges if that LEC is an intermediate, non-terminating carrier are required to modify their tariff provisions to preclude such charges in these circumstances.").

⁵⁶ See *Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, WT Docket No. 01-316, Declaratory Ruling, 17 FCC Rcd 13192 (2002) (*Sprint/AT&T Declaratory Ruling*), petitions for review dismissed, *AT&T Corp. v. FCC*, 349 F.3d 692 (D.C. Cir. 2003).

⁵⁷ We reject the argument made by Verizon Wireless that the *Sprint/AT&T Declaratory Ruling* does not limit the ability of a CMRS provider to collect access charges from an IXC if the CMRS provider has a contract with an intermediate competitive LEC. See Verizon Wireless White Paper at 21. We will not interpret our rules or prior orders in a manner that allows CMRS carriers to do indirectly that which we have held they may not do directly. See *Sprint/AT&T Declaratory Ruling*, 17 FCC Rcd at 13198, para. 12 ("There being no authority under the Commission's rules or a tariff for Sprint PCS unilaterally to impose access charges on AT&T, Sprint PCS is entitled to collect access charges in this case only to the extent that a contract imposes a payment obligation."). Moreover, we also reject the argument by Verizon Wireless that IXCs taking service under certain competitive LEC tariffs are somehow bound by these competitive LEC/CMRS agreements. See Verizon Wireless White Paper at 22. Indeed, except in limited circumstances, the Commission's rules specifically prohibit cross-referencing other documents within a tariff. See 47 C.F.R. § 61.74(a).

⁵⁸ We note that competitive LECs continue to have flexibility in determining the access rate elements and rate structure for the elements and services they provide consistent with the *CLEC Access Reform Order*. See *CLEC Access Reform Order*, 16 FCC Rcd at 9946, para. 55. For this reason, we reject concerns expressed by some commenters that this constraint would require competitive LECs to adopt the incumbent LEC rate structure. See, (continued....)

reasons that we identified in the *CLEC Access Reform Order*. Specifically, as competitive LECs and CMRS providers concede,⁵⁹ an IXC may have no choice but to accept traffic from an intermediate competitive LEC chosen by the originating or terminating carrier and it is necessary to constrain the ability of competitive LECs to exercise this monopoly power. This new rule regarding rates that may be charged when a competitive LEC is an intermediate carrier will apply on a prospective basis.⁶⁰

18. Neither the *CLEC Access Reform Order* nor the *Sprint/AT&T Declaratory Ruling* addressed the appropriate rate a competitive LEC may charge when it is not serving the end-user; therefore, during the time between the effective date of *CLEC Access Reform Order* and the effective date of this reconsideration order, general pricing principles must govern any dispute over the appropriate competitive LEC rate. As a rule, access rates, like all other tariffed rates, must be just and reasonable under section 201(b) of the Act, and access tariffs, like all other tariffs, must clearly identify each of the services offered and the associated rates, terms, and conditions.⁶¹ In this case, the Commission established only a single rate for each year of the transition period and did not state that this rate was available only if a competitive LEC served the end-user on a particular call. Accordingly, prior to this order on reconsideration, it would not have been unreasonable for a competitive LEC to charge the tariffed benchmark rate for traffic to or from end-users of other carriers, provided that the carrier serving the end-user did not also charge the IXC and provided that the competitive LEC's charges were otherwise in compliance with and supported by its tariff.⁶²

19. We reject the argument that Qwest's petition provides no basis for any change to the currently effective transitional benchmark rates. In an *ex parte* filing, US LEC argues that Qwest's request for clarification applies only to the final benchmark rates, as distinct from the transitional benchmark rates.⁶³ US LEC suggests that any clarification must be so limited and may apply only to the final benchmark rates at the competing incumbent LEC rate.⁶⁴ We disagree. The language and the arguments made in the petition suggest that Qwest's request is not limited in the manner suggested by US LEC. Although the petition requests that the Commission clarify the meaning of the "competing ILEC rate," it contains several statements that could apply equally to the transitional benchmark rates.⁶⁵ The

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e.g., Focal Comments at 6-7; Z-Tel Opposition at 3-6. See also US LEC Aug. 25 *Ex Parte* Letter at 2-3 (positing a number of arguments against imposing incumbent LEC rate structures on competitive LECs).

⁵⁹ See Verizon Wireless White Paper at 19 n.58 ("CMRS carriers wield as much 'monopoly power' here as CLECs do in the situations described in the [*CLEC Access Reform Order*].").

⁶⁰ See, e.g., 5 U.S.C. § 551(4); *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 208, 109 S. Ct. 468, 471-72 (1988).

⁶¹ 47 U.S.C. § 201(b). See also 47 C.F.R. § 61.2(a).

⁶² See *ITC DeltaCom Communications, Inc. v. US LEC Corp. et al.*, No. 3:02-CV-116-JTC (N.D. Ga. March 15, 2004) (holding that an IXC has no duty to pay a competitive LEC for transiting wireless toll-free calls where the terms of the competitive LEC's tariff cover only access to the competitive LEC's own end-users or transport of traffic that originates or terminates through a LEC switching system).

⁶³ See US LEC Aug. 25 *Ex Parte* Letter at 7.

⁶⁴ *Id.*

⁶⁵ For instance, Qwest requests that the competing LEC's "tariffed rate should exclude the amounts paid for access service that are . . . not provided by the competitive LEC." Qwest Petition at 2. In addition, even if Qwest intended its request to apply solely to the final benchmark rates, as US LEC suggests, we believe that clarifying the application of the transitional benchmark rates is a logical outgrowth of Qwest's proposal. See *City of Stoughton v.* (continued....)

arguments presented by Qwest to support its request are equally applicable to the transitional benchmark rates. Therefore, we find no reason why the Commission is prevented from clarifying the application of the transition benchmark rates or amending its rules prospectively, as set forth above.

20. Finally, we address a request by NewSouth Communications, Inc. that we clarify the meaning of the term "competing ILEC rate" as it applies to a competitive LEC that originates or terminates calls to its end-users after the three-year transition period ends on June 21, 2004.⁶⁶ NewSouth argues that a competitive LEC should be permitted to charge for all of the competing incumbent LEC access elements (including tandem switching and end office switching) if its switch serves a geographic area comparable to the competing incumbent LEC's tandem switch.⁶⁷ AT&T and MCI oppose NewSouth's request and assert that a competitive LEC may assess access charges on IXCs only for those access services that the competitive LEC actually provides.⁶⁸

21. We agree with NewSouth that clarification of this issue is necessary to avoid litigation and uncertainty, but we decline to adopt NewSouth's proposal. A primary objective of the *CLEC Access Reform Order* is to ensure that competitive LEC access charges are more closely aligned with incumbent LEC access rates.⁶⁹ As noted by AT&T and MCI, our long-standing policy with respect to incumbent LECs is that they should charge only for those services that they provide.⁷⁰ Under this policy, if an incumbent LEC switch is capable of performing both tandem and end office functions, the applicable switching rate should reflect only the function(s) actually provided to the IXC.⁷¹ We believe that a

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United States EPA, 858 F.2d 747, 751 (D.C. Cir. 1988) (holding that an agency may make changes to a proposed rule if the changes are a logical outgrowth of a proposal and previous comments). In order for a final rule to be a logical outgrowth of a proposal, the agency must have provided proper notice of the initial proposal. See *Sprint Corp. v. FCC*, 315 F.3d at 376. Because Qwest's petition was properly noticed in the context of a rulemaking proceeding, the logical outgrowth analysis may be applied. See *Access Charge Reform*, CC Docket No. 96-262, Public Notice, Report No. 2490 (rel. June 29, 2001), 66 Fed. Reg. 35628 (2001).

⁶⁶ See Letter from Jake E. Jennings, Senior Vice President, Regulatory Affairs and Carrier Relations, NewSouth Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-262, at Attach. (filed Mar. 2, 2004) (attaching Letters from Jake E. Jennings, Senior Vice President, Regulatory Affairs and Carrier Relations, NewSouth Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92, at 1 (filed Feb. 27, 2004).

⁶⁷ *Id.* at 1-2. NewSouth states that this is the standard that is applied pursuant to our reciprocal compensation rules for purposes of determining whether a competitive LEC may charge the tandem interconnection rate. See 47 C.F.R. § 51.711(a)(3).

⁶⁸ See Letter from Peter H. Jacoby, General Attorney, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-262, at 2-4 (filed Mar. 30, 2004) (AT&T Mar. 30 *Ex Parte* Letter); Letter from Henry G. Hultquist, MCI, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-262, at 2-3 (filed Mar. 22, 2004) (MCI Mar. 22 *Ex Parte* Letter). For example, they state that the functions performed by a competitive LEC switch when it subtends an incumbent LEC tandem are the same as those performed by an incumbent LEC end office, and therefore the competitive LEC should not be permitted to charge for tandem switching. See AT&T Mar. 30 *Ex Parte* Letter at 3; MCI Mar. 22 *Ex Parte* Letter at 2.

⁶⁹ *CLEC Access Charge Order*, 16 FCC Rcd at 9925, para. 3.

⁷⁰ See AT&T Mar. 30 *Ex Parte* Letter at 3 (citing *Bell Atlantic Telephone Companies*, 6 FCC Rcd 4794 (1991)); MCI Mar. 22 *Ex Parte* Letter at 2 (citing *AT&T Corp. v. Bell Atlantic-Pennsylvania*, 14 FCC Rcd 556 (1998)).

⁷¹ See, e.g., Ameritech Operating Companies, Tariff FCC No. 2, § 6.8.2(D)(4)(c) ("The Tandem Switching rate will not apply to access minutes that originate or terminate at the end office part of a Class 4/5 switch."); Verizon (continued....)

similar policy should apply to competitive LECs. Accordingly, we clarify that the competing incumbent LEC switching rate is the end office switching rate when a competitive LEC originates or terminates calls to end-users and the tandem switching rate when a competitive LEC passes calls between two other carriers. Competitive LECs also have, and always had, the ability to charge for common transport when they provide it, including when they sublend an incumbent LEC tandem switch. Competitive LECs that impose such charges should calculate the rate in a manner that reasonably approximates the competing incumbent LEC rate.⁷²

B. The CLEC New Markets Rule

1. Modifications to the CLEC New Markets Rule

22. As noted above, under the "CLEC new markets rule," competitive LECs may not tariff a rate higher than the competing incumbent LEC rate in those MSAs where the competitive LEC initiated service after the effective date of the *CLEC Access Reform Order*.⁷³ Several competitive LECs request reconsideration of this rule so that they may charge the same, declining benchmark rates in new markets that they do in markets served before June 20, 2001.⁷⁴ Alternatively, Time Warner requests that competitive LECs be permitted to charge the declining benchmark rates in those markets that they entered within a year of the order's effective date.⁷⁵ Focal argues that, at a minimum, the Commission should modify the CLEC new markets rule so that a competitive LEC that has "already invested or signed contracts" in a market could charge the benchmark rate, and would be restricted to the prevailing incumbent LEC rate only where "it had made no investments or had no customers prior to June 20, 2001."⁷⁶ Focal further argues that the Commission's adoption of the June 20, 2001 effective date was arbitrary and capricious, because the date does not address the impact on competitive LEC investment and imposes a "flash cut" reduction in rates on those that have already made substantial investment.⁷⁷

23. The competitive LECs argue that they make substantial investments when entering a new market long before they actually turn up the first customer, and that these investments are made in the

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Tariff FCC No. 14, § 4.5.2(H)(2)(f) ("The Tandem Switching rate also will not apply to access minutes that originate or terminate at the end office part of a Class 4/5 switch.").

⁷² See Letter from Jake E. Jennings, Senior Vice President, Regulatory Affairs and Carrier Relations, NewSouth Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 96-262 and 01-92, at 1 (filed May 6, 2004).

⁷³ *CLEC Access Reform Order*, 16 FCC Rcd at 9947, para. 58. See 47 C.F.R. § 61.26(d).

⁷⁴ See Focal Petition at 10-11; TDS Petition at 18-19; Time Warner Petition at 2; Focal Reply at 2-3. See also Letter from Lawrence Sarjeant, Vice President Regulatory Affairs and General Counsel, United States Telecom Association, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 96-262 at 2-3 (filed Nov. 20, 2001) (permitting competitive LECs entering new markets to obtain the benchmark rate will promote buildout, which, in turn, will promote the "redundant telecommunications facilities that are essential to ensuring that effective communications are available for homeland security") (USTA Nov. 20 *Ex Parte* Letter).

⁷⁵ See Time Warner Petition at 2, 5-7; see also Focal Comments at 2; Focal Reply at 3 n.10.

⁷⁶ Focal Petition at 10-11. See also ALTS Comments at 2 (Commission should rescind rule for carriers that have begun investing or implementing their business plan in a market); Time Warner Comments at 4 (supporting the relief requested by Focal); ASCENT Reply at 8 (supporting the relief requested by Focal and Time Warner).

⁷⁷ Focal Comments at 4. See also Focal Petition at 7-8.

expectation of receiving rates that are sufficient to pay off their investments.⁷⁸ As a result, they contend, it causes as much financial disruption to flash-cut to the competing incumbent LEC rate in new markets as it would to make such a change in an existing market.⁷⁹ In addition, competitive LECs assert that they develop their strategies, business plans, and product mixes well in advance of market entry, and, accordingly, they need the benefit of the declining, transitional benchmark to adjust their business plans for new markets as well as existing markets.⁸⁰ Focal argues that competitive LECs entering new markets will now have to compete not only against incumbent LECs who have substantial advantages with their economies of scope and scale, but also against other competitive LECs that entered the market before the new rules were adopted and therefore are entitled to the higher access rates.⁸¹ ALTS contends that, as a practical matter, many of its members have billing systems that cannot bill separately by MSA, but instead bill on a statewide basis, making it difficult to implement the new markets rule.⁸² Z-Tel argues that the new markets rule uniquely affects carriers using the unbundled network element (UNE) platform, because, before the implementation of the rule, their customers' location had no significance; such carriers could market throughout the area of the competing incumbent LEC, without regard to where particular customers were located. Under the new rule, however, a newly acquired customer that is otherwise identical to existing customers will bring a lower access rate if it falls outside of an MSA where the competitive LEC providing service over the UNE platform already provided service.⁸³ TDS contends that it is irrational to discriminate between carriers that have and have not begun serving customers by a certain date.⁸⁴

24. We decline to change the rule as the petitioners request. In adopting the benchmark system for competitive LEC access charges, the Commission intended to limit the subsidy flowing from IXCs and the long distance market to competitive LECs and their end-users, and to do so with a bright line mechanism that is objective and easy to enforce. The CLEC new markets rule eliminates, as of a specific date, the subsidy flowing from the interexchange market to competitive LECs entering new markets.⁸⁵ Modifying the rule as the competitive LECs suggest could substantially increase the amount

⁷⁸ See, e.g., Focal Petition at 7-8; Time Warner Petition at 6-7.

⁷⁹ See ALTS Comments at 4; ASCENT Comments at 8-9; Focal Comments at 4; Time Warner Comments at 4-5; USTA Nov. 20 *Ex Parte* Letter at 2.

⁸⁰ See Focal Petition at 8-9; TDS Petition at 18-19; Time Warner Petition at 2, 4, 6-7; ALTS Comments at 4-5; ASCENT Comments at 9; Focal Comments at 4; Z-Tel Opposition at 10-11; ASCENT Reply Comments at 8. Time Warner contends that the "critical point" of its petition is that "Time Warner must rely on the same market research and experience when making adjustments to both geographic markets it currently serves and geographic markets Time Warner plans to enter in the future." Time Warner Petition at 5.

⁸¹ Focal Petition at 9-10.

⁸² ALTS Comments at 6. See also Joint CLEC May 25 *Ex Parte* at 2-3 (stating that, as currently configured, competitive LEC billing systems are incapable of billing different rates on an MSA-specific basis).

⁸³ Z-Tel Opposition at 10.

⁸⁴ TDS Petition at 18. See also ASCENT Reply at 10.

⁸⁵ AT&T Opposition at 7. AT&T argues that artificial subsidies to increase a customer base will only increase the "disruption" and "dislocation" that ultimately results from inefficient competitive LEC entry. *Id.* See also WorldCom Opposition at 2.

by which IXCs subsidize competitors in the local-service market and would create ongoing incentives for economically inefficient entry in new markets.⁸⁶

25. We also decline to modify the rules so that a competitive LEC may tariff the benchmark rate in markets that it had merely planned to enter, but where it was not actually serving customers, before the effective date of our rules. Given the numerous different competitive LEC business plans and market entry strategies, we can conceive of no reliable, objective means of determining whether a competitive LEC has made sufficient investment in a particular market to justify tariffing the benchmark rate, nor have competitive LEC commenters suggested one.⁸⁷ In addition to continuing the subsidy flow to competitive LEC operations, the rule that the competitive LECs request would be susceptible to abuse, and difficult and time-consuming for this Commission to enforce.

26. Further, we are not persuaded by claims that the new markets rule is technically difficult to implement due to competitive LEC billing system limitations. The competitive LECs contend that their access billing systems make it impossible to comply with the new markets rule because access billing software is designed to bill on a statewide basis, rather than on an MSA basis.⁸⁸ The petitions filed by RICA and MCLEC suggest otherwise, however. These commenters argue that tariffing different access rates for different areas is not a significant burden.⁸⁹ Although the new markets rule may require some changes to current competitive LEC billing systems, RICA maintains that the changes required to track access by customer location for billing purposes "would not be significant."⁹⁰ To the extent that such changes are necessary, competitive LECs serving new markets in a state can assess whether changes to the billing system are worth the investment during the transition period to the competing incumbent LEC rate. Alternatively, the competitive LEC could determine that it is more cost-effective to move all access customers within a state to a rate at or below the incumbent LEC rate prior to expiration of the transition period.⁹¹ Thus, we are not convinced that the new markets rule is impossible to implement, as some parties contend.⁹²

27. The Commission strives to provide regulatory certainty, but changes to the regulatory landscape are as inevitable as other changes to the marketplace, and businesses are ultimately responsible

⁸⁶ See AT&T Opposition at 9-10.

⁸⁷ Accordingly, we agree with commenters suggesting that Focal's proposal of allowing higher rates where the competitive LEC had made investments or signed customers is "amorphous" and "unworkable." See, e.g., AT&T Opposition at 10.

⁸⁸ See ALTS Comments at 6; Z-Tel Comments at 10. See also Joint CLEC May 25 *Ex Parte* at 2-3 (attaching the declarations of several competitive LECs describing billing system limitations).

⁸⁹ See MCLEC Petition at 7; RICA Petition at 10-11. MCLEC further observes that section 61.26(b) already establishes a high probability that competitive LECs will have more than one access rate since that rule permits them to charge the higher of two different access rates that are likely to vary between areas. MCLEC Petition at 7 (discussing 47 C.F.R. § 61.26(b)).

⁹⁰ RICA Petition at 11.

⁹¹ For this reason, we are not convinced that the purported inability to bill on an MSA-basis prevents a competitive LEC from serving any particular market. See Z-Tel Petition for Waiver at 9. Indeed, nothing precludes a competitive LEC from implementing a uniform set of access rates at or below the level of the competing incumbent LEC rate.

⁹² See ALTS Comments at 6; Joint CLEC May 25 *Ex Parte* at 2-3.

for adjusting their business plans to take account of such changes.⁹³ There was no reason for competitive LECs to make investment decisions on the assumption that the status quo would remain unchanged, given the concerns expressed by the Commission about competitive LEC rates and the possible need to constrain those rates.⁹⁴ The Commission had signaled as early as the *Fifth Report and Order* on access reform that it believed that competitive LEC access rates were excessive in some instances, and competitive LECs had no reasonable expectation of being able, indefinitely, to charge higher rates than carriers with whom they compete.⁹⁵ Indeed, the Commission expressly sought comment on whether incumbent LEC access rates should serve as a benchmark to evaluate the reasonableness of competitive LEC access charges.⁹⁶

28. Moreover, we find that allegations of competitive harm resulting from the CLEC new markets rule do not undermine the reasons for adopting the rule. Z-Tel argues that the new markets rule uniquely affects carriers using the unbundled network element (UNE) platform because the rule “ignores the statewide nature of UNE Platform market entry.”⁹⁷ TDS contends that it is irrational to discriminate between carriers that have and have not begun serving customers by a certain date.⁹⁸ Focal argues that it will be at a competitive disadvantage when it enters a new market because it will face competition from incumbent LECs with historical advantages and from competitive LECs that are permitted to charge the higher, benchmark rate.⁹⁹

29. As an initial matter, at the conclusion of the transition period, all competitive LECs will be subject to a benchmark rate equal to the competing incumbent LEC rate.¹⁰⁰ To the extent that a competitive LEC enters a new market during the transition period, it may charge the same access rates as its primary competitor, *i.e.*, the incumbent LEC. In setting the benchmark level, the Commission sought to “mimic the actions of a competitive marketplace, in which new entrants typically price their product at or below the level of the incumbent provider.”¹⁰¹ As to competition among competitive LECs (UNE

⁹³ See Sprint Opposition at 4-5 (arguing that, since 1997, competitive LECs were on notice that attempts to charge access rates that exceeded incumbent LEC access rates may be subject to regulatory action): See also AT&T Opposition at 7-8.

⁹⁴ See *In the Matter of Access Charge Reform*, CC Docket No. 96-262, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14340, 14344, paras. 238, 247 (1999) (subsequent history omitted) (*Access Charge Further Notice*). The Commission observed that it may have “overestimated the ability of the marketplace to constrain CLEC access rates. In particular, IXCs allege that a substantial number of CLECs impose switched access charges that are significantly higher than those charged by the incumbent LECs with which they compete, suggesting that the Commission may need to revisit the issue of CLEC access rates.” *Id.* at 14340, para. 238.

⁹⁵ *Id.* at 14340, para. 238.

⁹⁶ *Id.* at 14344, para. 247.

⁹⁷ Z-Tel Opposition at 10.

⁹⁸ TDS Petition at 18. See also ASCENT Reply at 10.

⁹⁹ Focal Petition at 9-10.

¹⁰⁰ See 47 U.S.C. § 61.26(c) (establishing declining benchmark rates over a three-year transition period ending June 21, 2004). See also *supra* para. 5 (discussing the declining benchmark rates).

¹⁰¹ *CLEC Access Reform Order*, 16 FCC Rcd at 9941, para. 45.

platform providers or otherwise) in a particular market during the transition period, the CLEC new markets rule appropriately distinguishes between those competitive LECs that serve end-users and those that do not. The Commission's rules assure that the former are provided a transition period to adjust existing customer relationships; no such transition is needed for carriers that have no customers. We believe that the benefits of limiting application of the transition to a competitive LEC's existing markets outweigh any potential competitive harm resulting from the CLEC new markets rule.

30. Finally, some commenters request clarification that the rural exemption rate is available for competitive LECs entering new MSAs.¹⁰² That is, the new market rule does not apply if the competitive LEC would otherwise qualify for the rural exemption.¹⁰³ We agree that this is the correct interpretation of the Commission's order. The rural exemption rate is a substitute for the incumbent LEC rate that would otherwise be used as the benchmark rate. In adopting the rural exemption, the Commission recognized that rural competitive LECs experience higher costs, particularly loop costs, and may lack the lower cost urban operations that non-rural incumbent LECs use to subsidize rural operations.¹⁰⁴ Thus, it is appropriate that the rural exemption apply when a competitive LEC enters a new MSA. Based on our clarification here, we amend rule 61.26 (e) accordingly to read "Notwithstanding paragraphs (b) through (d) of this section...."¹⁰⁵

2. APA Compliance

31. ALTS and Focal argue that the Commission violated the Administrative Procedure Act (APA) because it did not provide notice that it was considering a different rule for new markets and did not provide any opportunity for parties to comment on it.¹⁰⁶ We disagree. The Commission specifically sought comment on the competing incumbent LEC rate as a benchmark.¹⁰⁷ In the *Further Notice of Proposed Rulemaking* immediately preceding the *CLEC Access Reform Order*, the Commission reminded interested parties that the Commission had "invited parties to address whether the incumbent LEC's terminating access charges should serve as a benchmark to evaluate the reasonableness of CLEC's terminating rates,"¹⁰⁸ and repeated its request for comment on this proposal. The Commission also reiterated that it was still considering a rule "that a CLEC's terminating access charges might be presumptively just and reasonable if they were less than or equal to the terminating access charges of the

¹⁰² See 47 C.F.R. § 61.26(d), (e).

¹⁰³ See MCLEC Petition at 11-13; RICA Petition at 11-12.

¹⁰⁴ See *CLEC Access Reform Order*, 16 FCC Rcd at 9950, para. 66.

¹⁰⁵ See Appendix A for final rules. This clarification requires us to note a typographical error in subsection (e) of 47 C.F.R. § 61.26 as printed. We note that the text of subsection (e), as released, referenced "paragraphs (b) through (c)" not "paragraphs (b) through (3)," which is the text found in the C.F.R. See *CLEC Access Reform Order*, 16 FCC Rcd at App. B. Due to an transcription error, the reference to subsection (c) in the final rules incorrectly appears in the C.F.R. as subsection (3). Because we amend rule 61.26 herein, the error is now moot.

¹⁰⁶ ALTS Comments at 2-3; Focal Petition at 2-6. See also Joint CLEC May 25 *Ex Parte* at 3-5 (arguing that adoption of the CLEC new markets rule constitutes a violation of the APA in that the Commission did not provide adequate notice and comment).

¹⁰⁷ *Access Charge Further Notice*, 14 FCC Rcd at 14344-45, paras. 247-48.

¹⁰⁸ *Id.* at 14344, para. 247 (citing *In the Matter of Access Charge Reform*, CC Docket No. 96-262, Notice of Proposed Rulemaking, Third Report and Order and Notice of Inquiry, 11 FCC Rcd 21354, 21476, para. 280 (1996)).

incumbent LEC with which the CLEC competes.”¹⁰⁹ Several commenters supported this proposal, arguing that the Commission should immediately set competitive LEC tariffed rates at or near the incumbent LEC rate.¹¹⁰ The Commission also asked whether these proposals should apply to originating access rates, as well as whether the benchmark “should vary depending on various criteria,” and, if so, “what criteria” the Commission should consider in determining the applicable benchmark.¹¹¹

32. As the record indicates, it should have been apparent to any interested party that the Commission was contemplating a benchmark at the competing incumbent LEC rate for at least some markets. That the Commission ultimately decided to adopt a transition mechanism for some parties does not in any way render the notice provided to parties defective.¹¹² The request for comments on incumbent LEC-based and other benchmarks was sufficient to “adequately frame the subjects for discussion,”¹¹³ providing affected parties a fair opportunity to express their views. Thus, ALTS and Focal could have anticipated that the new markets rule might be adopted based on proposals to set competitive LEC tariffed rates immediately at the incumbent LEC rate,¹¹⁴ and thus could have commented meaningfully on it.¹¹⁵

C. Rural Exemption

33. As explained above, the rural exemption to the benchmark scheme is available for a competitive LEC competing with a non-rural incumbent LEC.¹¹⁶ The exemption is not available, however, if any portion of the competitive LEC’s service area falls within a non-rural area.¹¹⁷ Qualifying

¹⁰⁹ *Id.*

¹¹⁰ *CLEC Access Reform Order*, 16 FCC Rcd at 9937, para. 36 and n. 87 (citing comments of Sprint, AT&T, and WorldCom supporting use of competing incumbent LEC rate as benchmark).

¹¹¹ *Access Charge Further Notice*, 14 FCC Rcd at 14345, para. 248.

¹¹² See, e.g., *Buckeye Cablevision, Inc. v. FCC*, 387 F.2d 220, 226-28 (D.C. Cir. 1967) (holding that failure by the Commission to mention “grandfather rights” in a Notice of Inquiry is not a fatal defect under the APA).

¹¹³ *Connecticut Light & Power Co. v. Nuclear Regulatory Commn.*, 673 F.2d 525, 533 (D.C. Cir.), *cert. denied*, 459 U.S. 835 (1982).

¹¹⁴ See AT&T Opposition at 7-8; Sprint Opposition at 4.

¹¹⁵ See, e.g., *Small Refiner Lead Phase – Down Task Force v. U.S.E.P.A.*, 705 F.2d 506, 548-49 (D.C. Cir. 1983) (holding that, in determining whether adequate notice was given, the court will consider whether a party “should have anticipated that a requirement might be imposed”). Accordingly, competitive LECs received adequate notice that this was a possibility. See *American Medical Ass’n v. United States*, 887 F.2d 760, 766-69 (7th Cir. 1989) (notice of final IRS rule providing three methods of allocating revenues sufficient where proposed rule enumerated seven factors to be considered in allocating revenues, as the final rule was “contained” in the proposed version and merely eliminated some of the alternative calculation methods).

¹¹⁶ See 47 C.F.R. § 61.26(e).

¹¹⁷ 47 C.F.R. § 61.26(a)(6) (defining a non-rural area as any incorporated place of 50,000 inhabitants or more, based on the most recently available populations statistics of the Census Bureau or any urbanized area, as defined by the Census Bureau). We note that SouthEast Telephone, Inc. (SouthEast) recently requested a waiver of section 61.26(a)(6) of the Commission’s rules to permit it to serve customers in metropolitan locations and maintain its eligibility for the rural exemption. See *Pleading Cycle Established For Petition of SouthEast Telephone, Inc. for Waiver of CLEC Access Charge Rules*, CC Docket No. 96-262, Public Notice, DA 04-936 (rel. April 2, 2004). Our decision here is made without prejudice to SouthEast’s waiver request. That petition will be addressed (continued....)

competitive LECs may tariff rates up to the highest NECA rate band minus the NECA tariff's CCL charge if the competing incumbent LEC is subject to CALLS access rates.¹¹⁸ Petitioners challenge all of these aspects of the exemption. That is, they seek to broaden the applicability of the exemption to competitive LECs competing with any price cap LEC and to competitive LECs serving non-rural areas to the extent they serve rural end-users. They also request that the Commission incorporate the CCL in the rural exemption rate, and seek clarification on the application of the multi-line business PICC. As explained in more detail below, we decline to make any of these changes to the rural exemption, and we clarify the application of the PICC under the rural exemption.

1. Status of Competing Carrier

34. Commenters argue that the rural exemption should apply to competitive LECs that serve an otherwise qualifying rural area, if they compete with *any price cap LEC*, rather than, as it is currently structured, applying only to competitive LECs competing with non-rural incumbent LECs.¹¹⁹ The petitioners argue that many price cap LECs, although they may qualify as rural, still have substantial, relatively dense population areas with which to subsidize the more diffuse, rural portions of their service areas.¹²⁰ Consequently, they argue, it is unfair to tie a rural competitive LEC's access rates to those of a rural price cap LEC that serves relatively dense population areas and has economies of scale not available to rural competitive LECs.¹²¹ This requested rule change would enable those competitive LECs competing with rural price cap LECs to charge NECA rates rather than the CALLS access rates applicable to their price cap LEC competitors.

35. We decline to expand the rural exemption as requested. The rural exemption was intended to prevent rural competitive LECs with high loop costs from being tied to a competing incumbent's access rate that reflects the incumbent's ability to subsidize high-cost, rural operations with

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separately under the Commission's well-established waiver standards. See *Northeast Cellular Telephone Company v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

¹¹⁸ 47 C.F.R. § 61.26(e). During the course of the debate over competitive LEC access charges, the Commission adopted an integrated interstate access reform and universal service proposal put forth by the members of the Coalition for Affordable Local and Long Distance Service (CALLS). See *In the Matter of Access Charge Reform*, CC Docket No. 96-262, Sixth Report and Order, 15 FCC Rcd 12962 (*CALLS Order*), *aff'd in part, rev'd in part, and remanded in part*, *Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001), *In the Matter of Access Charge Reform*, CC Docket No. 96-262, Order on Remand, FCC 03-164 (rel. July 10, 2003) (providing further analysis and explanation of the Commission's decision in the *CALLS Order*). The *CALLS Order* resolved major outstanding issues concerning access charges of price cap incumbent LECs by determining the appropriate level of interstate access charges and by converting implicit subsidies in interstate access charges into explicit, portable, and sufficient universal service support. *Id.* at 12974-76. The *CALLS Order* is interim in nature, covering a five-year period, beginning in July of 2000. *Id.* at 12977.

¹¹⁹ See RICA Petition at 7-8; RICA Reply at 1-4; see also MCLEC Petition at 9-10; MCLEC Reply at 4-5. MCLEC further notes that the definitions of rural competitive LEC and rural telephone companies do not line up properly, noting that a rural competitive LEC competing with a rural incumbent LEC can still face a competitor with substantially greater resources and economies of scale. MCLEC Reply at 4.

¹²⁰ See MCLEC Petition at 9-11; RICA Petition at 8. RICA contends that rural price cap incumbent LECs, as mid-sized companies serving third and fourth tier cities, still experience economies of scale not available to the rural competitive LECs. RICA Petition at 8.

¹²¹ See MCLEC Petition at 10; RICA Petition at 8.

more concentrated, low-cost urban operations.¹²² The Commission also sought, however, to keep the exemption as narrow as possible to minimize the strain it placed on the interexchange market. We agree that IXCs and their customers should not subsidize entry of rural competitive LECs that are unable to compete by charging lower prices or persuading end-users to pay higher rates.¹²³ Moreover, the petitioners seeking to expand the rural exemption make only generalized assertions about the ability of rural price cap carriers to subsidize their high cost operations without providing specific evidence on the question. Indeed, at least one price cap incumbent LEC challenges the underlying assumptions of the petitioners, noting that it has no urban areas to subsidize its rural areas and has a very diffuse service area.¹²⁴ AT&T concurs, arguing that rural incumbent LECs do not have the same ability as non-rural incumbent LECs to subsidize their access rates in rural areas by averaging their access rates across state-wide study areas that include lower cost urban and suburban areas.¹²⁵ There is inadequate evidence in the record that rate-averaging by rural price cap incumbent LECs creates a sufficient subsidy flowing to the higher cost portions of the incumbent LEC service areas to justify such an expansion of the rural exemption.

2. Location of Competitive LEC End-Users

36. Rural competitive LECs also contend that the rural exemption should apply to the extent that end-users are located in rural areas, arguing that a single end-user in a non-rural area should not entirely disqualify a competitive LEC from charging the NECA rate.¹²⁶ They state that the presence of some non-rural customers does not change the higher loop costs that rural competitive LECs continue to face in serving their rural end-users.¹²⁷ They also assert that the rule's current structure will increase litigation and administration costs because, for the IXCs, so much rides on finding even a single competitive LEC end-user that is located in a non-rural area.¹²⁸ ALTS argues that, without such an expansion, the exemption is virtually worthless because, according to ALTS, almost no competitive LECs serve exclusively rural areas.¹²⁹

37. We decline to broaden the application of the rural exemption in this manner. The exemption was designed as a narrow exception to the otherwise market-based rule that ties competitive LEC rates to those of their incumbent competitors in the access market. In adopting the rural exemption, the Commission emphasized the need for administrative simplicity, and noted that it would apply only to a small number of carriers serving a small portion of the nation's access lines.¹³⁰ Accordingly, we agree

¹²² *CLEC Access Reform Order*, 16 FCC Rcd at 9949-50, para. 64.

¹²³ *See Sprint Opposition* at 7-8; *see also WorldCom Opposition* at 3.

¹²⁴ *Iowa Telecom Opposition* at 2, 5-8. Alternatively, Iowa Telecom argues that it should be permitted to charge the NECA rates. *Iowa Telecom Opposition* at 9.

¹²⁵ *AT&T Opposition* at 11.

¹²⁶ *MCLEC Petition* at 3-4; *RICA Petition* at 10-11; *ALTS Comments* at 10; *MCLEC Reply* at 1-3.

¹²⁷ *MCLEC Petition* at 3-4; *ALTS Comments* at 10; *MCLEC Reply* at 2.

¹²⁸ *MCLEC Petition* at 5-7.

¹²⁹ *ALTS Comments* at 10.

¹³⁰ *See CLEC Access Reform Order*, 16 FCC Rcd at 9951, 9954, paras. 68, 75.

with IXCs that this rule change would improperly broaden the application of the rural exemption.¹³¹ The purpose of the exemption was to encourage competitive entry in truly rural markets. If a competitive LEC chooses to serve more concentrated, non-rural areas, in order to offset the cost of serving high-cost, rural customers, it should not also receive the subsidy of charging NECA rates for access to its rural end-users.

3. Exclusion of CCL Charge

38. Rural competitive LECs also request that we reverse the portion of the rural exemption rule that excludes the CCL charge from the NECA rate that they may charge if the competing incumbent LEC is subject to CALLS access charges.¹³² They contend that their costs, particularly loop costs, are significantly higher than those of the price cap LECs with which they typically compete, and that they should therefore be permitted to charge the CCL portion of the NECA rate.¹³³ RICA emphasizes that the Commission's *MAG Order*¹³⁴ has resulted in a significant reduction in interstate access revenue for rural

¹³¹ See AT&T Opposition at 12 ("If a rural CLEC can also go outside its rural area and sign up customers in lower cost urban and suburban areas, it too can average its cost of serving high-cost rural areas with the lower cost of serving urban and suburban areas, and there is no need for the rural exemption."); Sprint Opposition at 8 ("There is no reason to let a CLEC have the best of both worlds: competing in urban areas against an ILEC whose urban retail rates and access charges are affected by its rural operations, while being allowed to charge above-ILEC access charges in the rural portions of the ILEC's territory.") See also WorldCom Opposition at 3 ("The Commission's goal should be to contract, not expand, the number of end-users for which CLECs may impose access rates higher than those of their primary competitor, the ILEC. ... Moreover, if the CLEC overwhelmingly serves customers in rural areas, it can seek waiver of the Commission's rules.").

¹³² See MCLEC Petition at 13-14; RICA Petition at 5-7. Historically, incumbent LECs have recovered the interstate portion of common line costs through two separate charges -- the subscriber line charge (SLC), a flat-rated charge imposed on end-users, and the carrier common line charge (CCLC), a per-minute charge imposed on IXCs. In the 1997 *Access Charge First Report and Order*, the Commission required price cap LECs to recover a portion of these costs through a new presubscribed interexchange carrier charge (PICC), a flat-rated charge assessed on an end-user's presubscribed IXC. See *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, First Report and Order, 12 FCC Rcd 15982 (1997) (subsequent history omitted). In 2000, the Commission adopted the *CALLS Order*, an integrated access charge and universal service reform plan for price cap carriers, one feature of which was to raise SLC caps over time so as to phase out the PICC and CCLC and require price cap LECs to recover the majority of interstate common line costs from their end-users. See generally *CALLS Order*, 15 FCC Rcd 12962. In 2001, the Commission adopted an access charge and universal service reform plan for rate-of-return carriers. See *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation*, CC Docket No. 98-77, *Prescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, CC Docket No. 98-166, Second Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 00-256, Fifteenth Report and Order in CC Docket No. 96-45, and Report and Order in CC Docket Nos. 98-77 and 98-166, 16 FCC Rcd 19613 (2001) (*MAG Order*). As part of these reforms, the Commission raised SLC caps to the levels set for price cap carriers, eliminated CCL charges as of July 1, 2003, and replaced any resulting common line revenue shortfall with explicit universal service support. *Id.* Thus rate-of-return LECs recover all of their interstate common line costs through a combination of end-user charges and universal service; they recover none from IXCs.

¹³³ See MCLEC Petition at 13; RICA Petition at 3-5; RICA Reply at 6.

¹³⁴ *MAG Order*, 16 FCC Rcd at 19613.

competitive LECs charging the NECA rate, without having the same impact on NECA pool members.¹³⁵ MCLEC notes that, although rural competitive LECs can impose multi-line business PICCs, this does not make up for the lost revenue because rural areas have many fewer multi-line businesses than do the areas served by most CALLS incumbent LECs.¹³⁶

39. We decline to revise the rule to allow rural-exemption competitive LECs to charge the CCL portion of the NECA rate.¹³⁷ Excluding the NECA tariff's CCL charge when the competitive LEC competes with a CALLS incumbent LEC promotes parity between the competing carriers. The CCL charge, the SLC, and the PICC have been designed to recover common line costs from different sources; the CCL charge from IXCs, the SLC from end-users, and the PICC from multi-line businesses. Most incumbent LECs no longer collect CCL charges.¹³⁸ As the Commission previously explained, competitive LECs competing with CALLS incumbent LECs are free to build into their end-user rates a component equivalent to the incumbent LEC's SLC, as well as to assess IXCs a multi-line business PICC.¹³⁹ The competitive LEC should not be permitted to double recover common line costs by mirroring the incumbent LEC's SLC and PICC charges and also charging the NECA tariff's CCL charge to IXCs.¹⁴⁰

¹³⁵ See Letter from David Cosson, Counsel for RICA, to Marlene Dortch, Secretary, Office of the Secretary, Federal Communications Commission, CC Docket No. 96-262, at 10 (Jan. 30, 2003). RICA explains that the MAG order reduced the NECA rates by shifting recovery to end-users and to a new universal service support mechanism. *Id.*

¹³⁶ MCLEC Petition at 13-14.

¹³⁷ We note that, in accordance with the *MAG Order*, the CCL charge was eliminated for rate-of-return carriers as of July 1, 2003, thereby rendering this issue moot on a going forward basis. See *MAG Order*, 16 FCC Rcd at 19642, para. 61 (eliminating the CCL charge when SLC caps are scheduled to reach their maximum levels and the new universal service support mechanism, Interstate Common Line Support (ICLS), is implemented). We amend section 61.26(e) to remove any reference to the CCL. Similarly, we remove any reference to the transport interconnection charge, which also was eliminated. *Id.* at 19656-58, paras. 98-104.

¹³⁸ *CLEC Access Reform Order*, 16 FCC Rcd at 9956, para. 81 (explaining that the price cap LECs' CCL charges have been largely eliminated). Price cap LECs make up the CCL revenue by charging higher SLCs and the multi-line business PICC. According to information submitted in the 2003 annual filing, only four price cap LECs continue to collect CCL charges and these charges account for only .01 of one percent of the total common line revenues for the industry. Rate-of-return LECs make up the CCL revenue by charging higher SLCs and through the ICLS.

¹³⁹ *Id.*

¹⁴⁰ RICA argues that if the NECA rate drops because cost recovery is shifted to the Universal Service Fund, competitive LECs will need appropriate protection of their revenues. RICA suggests benchmarking the rural competitive LEC rate to the NECA rate plus "the average per minute or per line recovery shifted to the USF" or, alternatively, making rural competitive LECs eligible for USF on the same basis as rural incumbent LECs, rather than on the basis of the incumbent LEC with which the competitive LEC competes. RICA Petition at 9. In establishing a benchmark rate, our intent was more closely to align competitive LEC access rates with those of incumbent LECs. See *CLEC Access Reform Order*, 16 FCC Rcd at 9925, para. 3. Thus, our *CLEC Access Reform Order* addressed only those charges assessed by incumbent LECs and competitive LECs on IXCs. The Commission's methodology for calculating high-cost universal service support for different eligible telecommunications carriers serving the same areas is being reexamined in a separate proceeding now before the Federal-State Joint Board on Universal Service. See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, 17 FCC Rcd 22642 (2002); Public Notice, 18 FCC Rcd 1941, 68 FR 10429 (rel. Mar. 5, 2003).

4. Application of PICC

40. RICA asks us to clarify whether PICCs may be tariffed in addition to the rural exemption rate.¹⁴¹ RICA argues that the *CLEC Access Reform Order* could be interpreted as defining the rural exemption rate as the NECA rate, minus CCL charge, plus some component to account for the multi-line business PICC.¹⁴² Stated differently, RICA seeks clarification as to whether a competitive LEC may impose the multi-line PICC on top of the rural exemption rate.¹⁴³ RICA also requests that we clarify whether PICCs may be tariffed when the competing incumbent LEC does not have a PICC.¹⁴⁴ Sprint believes that, under the *CLEC Access Reform Order*, the composite access rate charged by a competitive LEC, including any PICC, may not exceed the rural exemption rate.¹⁴⁵ Thus, Sprint argues that competitive LECs may not assess a multi-line PICC on top of the applicable rural exemption rate, but may assess a PICC as part of the charges that make-up the composite rate.¹⁴⁶

41. As the Commission stated in its *CLEC Access Reform Order*, rural competitive LECs competing with CALLS incumbent LECs are free to assess IXCs a multi-line PICC charge.¹⁴⁷ Indeed, as discussed above, the ability of rural competitive LECs to assess a multi-line business PICC obviated, in part, the need for a CCL charge because the PICC provided a potential revenue source.¹⁴⁸ The question presented by RICA is whether the PICC, if assessed, must be included in the calculation of the rural exemption rate or whether the PICC may be assessed in addition to the rural exemption rate. We clarify that a PICC may be imposed by a rural competitive LEC in addition to the rural exemption rate if and only to the extent that the competing incumbent LEC assesses a PICC, and we revise section 61.26(e) of the Commission's rules accordingly.¹⁴⁹

D. Structure of the Benchmark

42. TDS requests that we modify the benchmark scheme to allow competitive LECs to charge higher access rates in lower density markets. TDS argues that UNE loop prices vary dramatically with density zone, and that the benchmark rate should recognize that carriers serving tier 2 and 3 markets have greater loop expenses because of lower customer density, just as the rural exemption recognizes for

¹⁴¹ RICA Petition at 15-16.

¹⁴² RICA notes that subsection (e) of the rule suggests exclusion of the multi-line business PICC, and requests clarification regarding the rule. RICA Petition at 15-16. Section (e) of the rule provides that "a rural CLEC competing with a non-rural ILEC shall not file a tariff for its interstate exchange access services that prices those services above the rate prescribed in the NECA access tariff, assuming the highest rate band for local switching and the transport interconnection charge." 47 C.F.R. § 61.26(e).

¹⁴³ Sprint Opposition at 9.

¹⁴⁴ RICA Petition at 15.

¹⁴⁵ Sprint Opposition at 9-10.

¹⁴⁶ *Id.*

¹⁴⁷ *Access Charge Reform Order*, 16 FCC Rcd at 9956, para. 81.

¹⁴⁸ *Id.*

¹⁴⁹ See Appendix A.

rural carriers.¹⁵⁰ TDS further argues that the order fails to take into account the different cost structure of incumbent LECs, their economies of scale, and their protected monopoly status during which they developed much of their customer base.¹⁵¹

43. Under TDS's proposal, two sets of access rates, above the 2.5-cent benchmark but below the rural exemption rate, would be available for competitive LECs serving areas of lower density that have already been so identified for such purposes as UNE or access pricing.¹⁵² In support of this proposal, TDS also argues that the CALLS plan resulted in negotiated access rates and revenue flows that do not necessarily coincide with CALLS carrier statewide or individual market costs.¹⁵³ TDS contends that, as long as access charge averaging prevails, the largest incumbent LECs cannot charge rates that reflect differences in cost between their urban core markets and their Tier 2 and 3 and residential market segments.¹⁵⁴ TDS seeks a disaggregation of the averaged incumbent LEC benchmark and of a comparable NECA rate to what it contends more closely resembles the rate differentials that a "truly market-driven system would bring about."¹⁵⁵

44. We decline to adopt this modification to the benchmark system. Instead, we will maintain the current structure of benchmark, which ties the rates of non-rural competitive LECs to the higher of the 2.5-cent benchmark or the rate of the competing incumbent LEC rate. The logic of TDS's multi-tier benchmark system – allowing higher access rates for areas of progressively lower density – may be consistent with the logic of the rural exemption; however, the rural exemption was designed as a limited exception to an otherwise broadly applicable rule that would drive competitive LEC access rates to those of the competing incumbents. As stated earlier, in adopting the rural exemption, the Commission emphasized the need for administrative simplicity, and noted that it would apply only to a small number of carriers serving a small portion of the nation's access lines.¹⁵⁶ We believe that adoption of TDS's proposal would not meet the need for simplicity and narrow application.

45. Additionally, the proxies for density that TDS suggests would be ill-suited to the job. In some cases, access pricing zones are no longer tied to density and may be changed at will by an incumbent's tariff filing.¹⁵⁷ UNE pricing zones are not uniformly implemented across the states and,

¹⁵⁰ TDS Petition at 7-9, 13-15.

¹⁵¹ *Id.* at 11. TDS also contends that it is discriminatory to treat competitive LECs serving smaller markets the same as those competitive LECs that serve national markets and have substantially greater economies of scale and resources. *Id.*

¹⁵² TDS Petition at 8-9. TDS first set out this multi-tiered benchmark proposal in its last set of reply comments in the rulemaking. Because of an apparent glitch in the computer docketing system, however, bureau staff did not include these comments in the rulemaking. Based on this failure, TDS seeks reconsideration of the benchmark system. TDS Petition at 6-9. TDS also requested a stay of the *CLEC Access Reform Order* until at least such time as the Commission has issued a decision on the merits in response to its petition for reconsideration. See TDS Petition for Stay at iii. Inasmuch as we deny TDS's petition for reconsideration of the *CLEC Access Reform Order*, the petition for stay is denied as moot.

¹⁵³ TDS Petition at 11; TDS Reply at 5.

¹⁵⁴ TDS Reply at 5.

¹⁵⁵ *Id.*

¹⁵⁶ See *CLEC Access Reform Order*, 16 FCC Rcd at 9951, 9954, paras. 68, 75.

¹⁵⁷ See 47 C.F.R. § 69.727.

depending on population patterns and state implementation, a particular zone may cover areas of dramatically different density in two states. Finally, the arguments made by TDS rely on the assumption that there has been some regulated determination of competitive LEC costs, including separations and cost allocation, that conclusively establishes that the access costs of competitive LECs are higher than the rates set by the Commission, which is not the case.¹⁵⁸ For these reasons, we reject TDS's proposal to change the existing benchmark structure.

E. Multiple Incumbent LECs in a Service Area

46. TelePacific requests that the Commission clarify what access rate applies when more than one incumbent LEC operates within a competitive LEC's service area.¹⁵⁹ TelePacific notes that, as competitive LECs enter new markets (and as the transitional benchmark declines), they may have to set their access rate at the "competing [incumbent] LEC rate" when there are multiple such rates.¹⁶⁰ TelePacific requests that the Commission prescribe precisely how the "competing [incumbent] LEC rate" should be calculated for those cases when a competitive LEC serves areas covered by two incumbents with differing rates, asserting that it is overly burdensome for competitive LECs to charge different rates for access to end-users falling in different incumbent LEC territories.¹⁶¹ TelePacific suggests various means of setting this competing incumbent LEC rate,¹⁶² and it argues that, without such clarification, competitive LEC market entry will be delayed or possibly abandoned altogether because of uncertainty about rates and the prospect of IXC refusal to pay, or litigation.¹⁶³

47. By moving competing LEC access rates to the competing incumbent LEC rate, the Commission intended for competitive LECs "to receive revenues equivalent to those the ILECs receive from IXCs."¹⁶⁴ The Commission's rules define the "competing ILEC" as the local exchange carrier "that would provide interstate exchange access service to a particular end user if that end user were not served by the CLEC."¹⁶⁵ Thus, as AT&T correctly observes, there is only one "competing ILEC" and one "competing ILEC rate" for each particular end-user.¹⁶⁶ Accordingly, competitive LECs serving an area with multiple incumbent LECs can qualify for the safe harbor by charging different rates for access to

¹⁵⁸ AT&T notes that TDS has offered no actual cost data to support its assertion that its costs are above the amount it can recover through access charges. AT&T Opposition at 15.

¹⁵⁹ TelePacific Petition at 1-3. See also ALTS Comments at 6-9 (supporting TelePacific request for clarification); Time Warner Comments at 2-3.

¹⁶⁰ TelePacific Petition at 4.

¹⁶¹ TelePacific Petition at 2-3, 5-6; TelePacific Revised Reply at 2-3.

¹⁶² TelePacific suggests three ways the Commission could set this rate: (1) simple average of the incumbent LEC rates from the competitive LEC's service area; (2) weighted average based on the number of end-user lines in each of the incumbent LEC territories within the competitive LEC's service area; or (3) weighted average based on the relative traffic volumes statewide. TelePacific Petition at 7-9. See also Time Warner Comments at 3; ALTS Comments at 7-8 (advocating use of a straight average approach).

¹⁶³ TelePacific Revised Reply Comments at 4-5. See also ALTS Comments at 7.

¹⁶⁴ CLEC Access Reform Order, 16 FCC Rcd at 9945, para. 54.

¹⁶⁵ 47 C.F.R. § 61.26(a)(2).

¹⁶⁶ See AT&T Opposition at 16.

particular end-users based on the access rate that would have been charged by the incumbent LEC in whose service area that particular end-user resides.¹⁶⁷

48. The record suggests, however, that some competitive LECs may prefer to charge IXCs a blended access rate when more than one incumbent LEC operates within a competitive LEC's service area.¹⁶⁸ One alternative for competitive LECs is to negotiate a blended access rate with the IXCs. If a competitive LEC charges a blended access rate other than a negotiated rate, such a rate must reasonably approximate the rate that an IXC would have paid to the competing incumbent LECs for access to the competitive LEC's customers. That is, a blended rate is reasonable if it does not result in revenues that exceed those the competing incumbent LECs would receive from IXCs for access to those customers. Although we decline to specify the precise manner in which a competitive LEC must set its access rates when it serves the area of multiple incumbent LECs,¹⁶⁹ we believe that a weighted average calculation based on the number of minutes of use generated by a competitive LEC's end-user customers in different incumbent LEC territories is consistent with this standard.¹⁷⁰ In such cases, the competitive LEC bears the burden of demonstrating that its blended rate approximates the rate that an IXC would have paid to the competing incumbent LECs for access to the competitive LEC's customers.

F. Billing Name Information

49. Qwest contends that an IXC's duty under section 201(a) to accept competitive LEC access traffic should exist only when the competitive LEC provides adequate billing name and address (BNA) information, so that the IXC can properly bill the competitive LEC end-user for the calls made.¹⁷¹ Qwest argues that, in the absence of adequate BNA information, the IXC should be permitted to refuse to accept (or pay for) competitive LEC access service, because without such information, the IXC cannot collect for the traffic it carries.¹⁷²

50. We decline to condition the IXCs' section 201(a) duty to accept competitive LEC access services on the provision of BNA information that the IXC deems sufficient. The Commission considered the issue of LEC obligations to provide BNA information in the context of an extensive rulemaking proceeding, and determined that, in some cases, LECs are required to provide billing information under tariff.¹⁷³ If IXCs believe that the current rules do not provide for adequate BNA

¹⁶⁷ See *id.*

¹⁶⁸ For instance, TelePacific states that its billing systems do not identify the competing incumbent LEC relevant to an end-user's access traffic and that developing such a billing system would be costly and difficult. See TelePacific Petition at 5-6.

¹⁶⁹ Dictating precisely how a competitive LEC must calculate the competing incumbent LEC rate when it serves more than one incumbent LEC area will involve the Commission unnecessarily in the details of competitive LEC rates when, as we stated in the *CLEC Access Reform Order*, we are trying to minimize our regulation of them. *CLEC Access Reform Order*, 16 FCC Rcd at 9939, para. 41.

¹⁷⁰ See AT&T Opposition at 17.

¹⁷¹ Qwest Petition at 4-6.

¹⁷² *Id.* See also AT&T Opposition at 19-20 (agreeing that an IXC must be able to decline to accept competitive LEC access traffic if the competitive LEC fails to provide sufficient BNA information).

¹⁷³ See *In the Matter of Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, CC Docket No. 91-115, Second Report and Order, 6 FCC Rcd 4478 (1993); *In the Matter of Policies and Rules Concerning Local Exchange Carrier Validation and Billing* (continued....)

information or if IXC's continue to have difficulty obtaining BNA information from competitive LECs, they can seek appropriate relief from the Commission.¹⁷⁴ Moreover, the competitive LECs persuasively argue that Qwest's proposal would encourage IXC's to find inadequacies with competitive LECs' BNA information in order to avoid accepting (and paying for) access service.¹⁷⁵ This could create a loophole in the 201(a) obligation that the Commission imposed and would thereby again endanger the ubiquity of the network, a consideration that substantially animated the *CLEC Access Reform Order*.

G. Other Matters

1. RICA Claims Regarding AT&T Discontinuance of Service.

51. RICA requests a determination regarding whether an IXC's withdrawal from certain service areas or refusal of service to certain carriers' end-users amounts to a violation of section 214.¹⁷⁶ In the *CLEC Access Reform Order*, the Commission concluded that it need not address the applicability of section 214 because it would be a violation of section 201(a) for an IXC to refuse service to a competitive LEC end-user where the competitive LEC has tariffed access rates within the safe harbor.¹⁷⁷ RICA contends that, by not resolving the section 214 issue, the Commission failed to address whether past refusals of AT&T to continue providing service without authority from the Commission violated the Act.¹⁷⁸ RICA also requests enforcement of section 203(c), which requires carriers to comply with their tariffs.¹⁷⁹ RICA contends that AT&T violated its own tariffs by refusing to serve end-users even where access to arrangements were available to them.¹⁸⁰

52. We decline to address in this order whether past refusals of AT&T to continue providing service without authority from the Commission violate section 214 and section 203(c) of the Act. Whether the prior actions of AT&T violated the Act depends on fact-specific findings that are more

(Continued from previous page)

Information for Joint Use Calling Cards, Petitions for Waiver of Rules Adopted in the BNA Order, CC Docket No. 95-115, Second Order on Reconsideration, 8 FCC Rcd 8798 (1993) (subsequent history omitted); *In the Matter of Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, CC Docket No. 91-115, Third Order on Reconsideration, 11 FCC Rcd 6835, 6856, para. 38 (1996) (clarifying that LECs are required to provide BNA information associated with calling card, third party, and collect calls) (subsequent history omitted).

¹⁷⁴ IXCs could seek this relief via a petition for rulemaking or on a case-by-case basis. See ALTS Comments at 13 (suggesting that the appropriate remedy for the IXC would be to file a section 208 complaint and seek redress from the Commission on a case-by-case basis).

¹⁷⁵ ALTS, ASCENT, and Z-Tel raise the concern that giving IXCs the option of rejecting competitive LEC access service invites abuse, by creating a danger of unilateral action by IXCs displeased with competitive LEC actions. ALTS Comments at 13-14; ASCENT Comments at 6; Z-Tel Opposition at 7-8; ASCENT Reply at 6-7.

¹⁷⁶ RICA Petition at 12-13 (citing RICA, Request for Emergency Temporary Relief Enjoining AT&T Corp. from Discontinuing Service Pending Final Decision, Feb. 18, 2000, at 12). See also RICA Reply at 8-9.

¹⁷⁷ *CLEC Access Reform Order*, 16 FCC Rcd at 9961, paras. 96-97.

¹⁷⁸ RICA Petition at 12-13.

¹⁷⁹ *Id.* at 13. See also 47 U.S.C. § 203(c).

¹⁸⁰ RICA Petition at 12-13.

appropriately handled in the context of an enforcement proceeding.¹⁸¹ Indeed, RICA appears to acknowledge this in its petition by stating that "enforcement action is...required."¹⁸² To the extent that RICA believes it has been harmed by AT&T's prior actions, it may seek a remedy via our complaint process or the courts.

2. Section 202(a) and 203(c) Violations

53. RICA requests clarification whether competitive LECs that file access tariffs and then also negotiate different rates with certain IXCs violate sections 202(a) or 203(c).¹⁸³ RICA contends that these provisions of the Act "historically have been applied to require that a carrier cannot agree to charge a customer at other than its filed tariff rate and that charging different rates to similarly situated customers is unlawful."¹⁸⁴ According to RICA, it appears that, under the *CLEC Access Reform Order*, competitive LECs may charge and enforce tariff rates, but nevertheless negotiate a different rate or regulation with some access customers without violating these Act provisions.¹⁸⁵ RICA also requests a statement that the Commission will not impose forfeitures for violation of these sections in this situation.¹⁸⁶ AT&T argues that there is no need for clarification that competitive LECs can provide access services to IXCs pursuant to intercarrier agreements subject to section 211 of the Act instead of tariffs.¹⁸⁷ Sprint responds that this type of discrimination claim must be decided on a case-by-case basis, and that without a factual record, the Commission cannot opine on this.¹⁸⁸

54. We deny RICA's request. In this case, we agree with Sprint that any claims in this context concerning violations of section 202(a) or section 203(c) should be decided on a case-by-case basis because such claims depend on fact-specific circumstances. Section 202(a) of the Act makes it unlawful "for any common carrier to make any unjust or unreasonable discrimination in charges, practices, ... facilities, or services, ... or to make or give any undue or unreasonable preference or advantage to any particular person."¹⁸⁹ Section 203(c) specifies that carriers must apply the rates and

¹⁸¹ RICA asks the Commission to conclude that AT&T's refusal to serve competitive LEC customers also violates section 201(b), section 202(a), and possibly section 254(g) of the Act. See Letter from Clifford C. Rhode, Counsel for RICA, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-262 (filed July 18, 2002) (attaching Letter from David Cosson, Attorney for Rural Independent Competitive Alliance to Jeffrey Dygert, Deputy Division Chief, Pricing Policy Division, Wireline Competition Bureau, Federal Communications Commission, CC Docket No. 96-262 at 3-4 (filed July 18, 2002)). We decline to address whether past refusals of AT&T to continue providing service violates these sections as well because whether the prior actions of AT&T violated these sections of the Act also depends on fact-specific findings that are more appropriately handled in the context of an enforcement proceeding.

¹⁸² RICA Petition at 13.

¹⁸³ See *id.* at 13-15. See also RICA Reply at 6-8.

¹⁸⁴ RICA Petition at 13-14.

¹⁸⁵ *Id.* at 14. See also RICA Reply Comments at 8.

¹⁸⁶ RICA Petition at 13-14.

¹⁸⁷ AT&T Opposition at 13 n. 17. Section 211 of the Act requires carriers to file intercarrier contracts or agreements with the Commission. 47 U.S.C. § 211.

¹⁸⁸ Sprint Opposition at 9.

¹⁸⁹ 47 U.S.C. § 202(a).

regulations set forth in their tariffs.¹⁹⁰ In order to determine whether a carrier's conduct violates these provisions of the Act, the Commission must consider certain facts. For instance, in determining whether a carrier is in violation of section 202(a), the Commission applies a three-pronged test, which includes a consideration of whether the services at issue are "like" services.¹⁹¹ In each case, the Commission should evaluate the unique circumstances and make a determination based on the factual record.

55. RICA responds that, even if more facts are necessary to determine violations under section 202, no such specifics are necessary under section 203, which provides an "absolute command."¹⁹² As an initial matter we note that section 203 does not contain an absolute command, as RICA contends. Section 203 begins by stating that "[n]o carrier, *unless otherwise provided by or under authority of this Act*, shall engage or participate in such communication unless schedules have been filed and published."¹⁹³ In the *CLEC Access Reform Order*, the Commission provided, pursuant to its authority under the Act, that competitive LECs may obtain higher rates through negotiation.¹⁹⁴ Further, we can imagine no situation where an IXC would voluntarily negotiate a higher rate for an access service identical to that offered pursuant to tariff. We continue to believe, and there is nothing in the record to the contrary, that an IXC paying a rate in excess of the benchmark likely will receive additional features beyond the tariffed service.¹⁹⁵

3. Negotiation Requirement

56. TDS complains that the Commission failed to provide a backstop for a competitive LEC in a higher cost market to demonstrate that its costs exceed the incumbent LEC's average charges for the competitive LEC's portion of the incumbent LEC service area.¹⁹⁶ TDS urges the Commission to modify its order to require IXCs to negotiate or submit to arbitration to set cost-based rates in density zones where incumbent LEC UNE and transport charges are already deaveraged because of density-based cost differentials.¹⁹⁷ TDS also urges the Commission to permit competitive LECs to charge higher tariffed rates if they can demonstrate that their costs exceed those of the incumbent LEC.¹⁹⁸ Sprint opposes the arbitration request, arguing that above-benchmark rates, in the absence of an IXC's agreement to pay them, "are simply impermissible" under the rules.¹⁹⁹ Sprint further argues that the competitive LEC

¹⁹⁰ *Id.* §203(c).

¹⁹¹ See, e.g., *MCI Telecommunications Corp. v. FCC*, 917 F.2d 30, 39 (D.C. Cir. 1990); *Allnet Communications Serv., Inc. v. US West, Inc.* 8 FCC Rcd 3017, 3025, para. 38 n. 87 (1993).

¹⁹² RICA Reply at 8.

¹⁹³ 47 U.S.C. § 201(c) (emphasis added).

¹⁹⁴ See *CLEC Access Reform Order*, 16 FCC Rcd at 9940, para. 43.

¹⁹⁵ See *id.* at 9937, para. 37.

¹⁹⁶ TDS Petition at 17.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ Sprint Opposition at 10-11.

remains able to pass along costs to its end-user customers, and those customers will discipline the market by making their carrier selections accordingly.²⁰⁰

57. We reject TDS's requests that we impose a negotiation or arbitration requirement on IXCs and permit competitive LECs to tariff rates above the benchmark if cost-justified. Both of TDS's requests assume incorrectly that the Commission adopted a cost-based approach to competitive LEC access charges in its *CLEC Access Reform Order*.²⁰¹ The Commission explicitly declined to apply this sort of regulation to competitive LECs²⁰² and explained that it was applying a market-based approach.²⁰³ Consistent with this finding, the Commission held that it will assess the reasonableness of competitive LEC access rates by evaluating market factors rather than a particular carrier's costs.²⁰⁴ The requests by TDS would involve an examination of carrier costs rather than market data to determine competitive LEC access rates. Because such an examination would be contrary to the Commission's market-based approach to competitive LEC access charges, we must reject TDS's requests.

58. Further, contrary to TDS's assertion, the Commission did acknowledge a remedy in the form of end-user charges for competitive LECs that incur higher costs. In the *CLEC Access Reform Order*, the Commission concluded that competitive LEC access service rates above the benchmark should be mandatorily detariffed, which requires competitive LECs to negotiate higher prices with IXCs.²⁰⁵ If the parties cannot agree, the Commission stated that "the CLEC must charge the IXC the appropriate benchmark rate."²⁰⁶ The Commission further noted that competitive LECs remain free to recover from their end-users any higher costs that they incur in providing access service.²⁰⁷ Thus, under the *CLEC Access Reform Order*, the "backstop" for a competitive LEC in a higher cost market is to charge the benchmark rate and recover any additional costs from its end-users. The Commission reasoned that, when a competitive LEC attempts to recover additional amounts from its end-user, the customer receives the correct price signals, which results in market discipline.²⁰⁸ TDS fails to demonstrate that this rationale is flawed or that this "backstop" is insufficient to cover any costs in excess of the benchmark.

²⁰⁰ *Id.* at 11.

²⁰¹ See AT&T Opposition at 14-15.

²⁰² See *CLEC Access Reform Order*, 16 FCC Rcd at 9939, para. 41. In particular, we found that a new entrant in a competitive market would not be able to charge a higher rate than the incumbent for the same service. *Id.* at 9937, para. 37.

²⁰³ *Id.* at 9941, para. 45 (stating that, in setting the benchmark rate, "we seek, to the extent possible, to mimic the actions of a competitive marketplace").

²⁰⁴ *AT&T v. BTI*, 16 FCC Rcd at 12321-22, paras. 17-21.

²⁰⁵ *CLEC Access Reform Order*, 16 FCC Rcd at 9925, para. 3.

²⁰⁶ *Id.* See also *id.* at 9956, para. 82.

²⁰⁷ *Id.* at 9938, para. 39.

²⁰⁸ *Id.*

4. Interconnection Obligations and Section 201

59. In the *CLEC Access Reform Order*, the Commission determined that section 201(a) of the Act places certain limitations on an IXC's ability to refuse competitive LEC access service.²⁰⁹ Specifically, the Commission concluded that "an IXC that refuses to provide service to an end user of a CLEC charging rates within the safe harbor, while serving the customers of other LECs within the same geographic area, would violate section 201(a)."²¹⁰ The Commission reasoned that, because a competitive LEC's access rates are presumed reasonable if they fall at or below the benchmark, a request by a competitive LEC's end-user is a "reasonable request" for service under section 201(a) if the competitive LEC charges rates at or below the benchmark.²¹¹ Thus, in determining limitations on an IXC's ability to refuse service under section 201(a), the Commission focused on the first clause of section 201(a), which requires common carriers to furnish communication service upon reasonable request therefor.²¹²

60. In discussing limitations on an IXC's ability to refuse service under 201(a), the Commission also referenced the second clause of section 201(a), which empowers the Commission, after a hearing and determination of the public interest, to order common carriers to establish physical connections with other carriers, and to establish through routes and charges for certain communications.²¹³ The Commission did not, however, explicitly rely on this portion of section 201(a) in imposing limitations on an IXC's ability to refuse service. The Commission now finds it necessary to clarify its intent to rely on the second clause of section 201(a) to support such limitations.²¹⁴

²⁰⁹ *CLEC Access Reform Order*, 16 FCC Rcd at 9960, para. 92. See 47 U.S.C. § 201(a). Section 201(a) of the Act states that it is "the duty of every common carrier engaged in interstate or foreign communication ... to furnish such communication service upon reasonable request therefor." *Id.* It further requires that common carriers establish physical connections with other carriers where, after the opportunity for a hearing, the Commission has found such action "necessary or desirable in the public interest." *Id.*

²¹⁰ *CLEC Access Reform Order*, 16 FCC Rcd at 9961, para. 94.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.* at 9960, para. 92 (discussing 47 U.S.C. § 201(a)).

²¹⁴ On June 14, 2002, the Court of Appeals for the D.C. Circuit vacated a declaratory ruling by the Commission concerning an IXC's obligation to purchase access service from a competitive LEC when an end-user has requested that it provide interexchange service through the competitive LEC. See *AT&T Corp. v. FCC*, 292 F.3d 808, 812-13 (D.C. Cir. 2002), vacating *AT&T and Sprint Petitions for Declaratory Ruling on CLEC Access Charge Issues*, CCB/CPD No. 01-02, Declaratory Ruling, 16 FCC Rcd 19158 (2001) (*AT&T Declaratory Ruling*). In that declaratory ruling, the Commission found that the first clause of section 201(a) imposes a duty on common carriers to accept reasonable requests for service, and that the request to complete a call using a competitive LEC access service that is tariffed at presumptively reasonable rates satisfies this requirement. *AT&T Declaratory Ruling*, 16 FCC Rcd at 19263-64. AT&T filed a petition for review of this ruling, challenging the Commission's reliance on the first clause of section 201(a) of the Act, and the court granted AT&T's petition. Specifically, the court rejected the notion that a competitive LEC's demand to an IXC for a physical connection or a through route is a request by the competitive LEC's customer for such service under the first clause of section 201(a). *AT&T v. FCC*, 292 F.3d at 812. According to the court, "if the FCC wants to compel AT&T to establish a through route with another carrier, then the FCC must follow the procedures specified in the second clause of [section] 201(a)." *Id.* We now expressly rely on the second clause of 201(a) to support Commission-imposed limitations on an IXC's ability to refuse competitive LEC access service.

61. The second clause of 201(a) provides that the Commission may compel a common carrier to establish a physical connection or a through route after opportunity for hearing if it finds such action necessary or desirable in the public interest.²¹⁵ After notice and comment, the Commission found that a limitation on an IXC's ability to refuse service was necessary and desirable in the public interest.²¹⁶ In the *CLEC Access Reform Order*, the Commission concluded that a limitation on an IXC's ability to refuse service was necessary in order to protect universal connectivity and universal service – two important policy goals that our rules are designed to promote.²¹⁷ The Commission reasoned that “any solution to the current problem that allows IXCs unilaterally and without restriction to refuse to terminate calls or indiscriminately to pick and choose which traffic they will deliver would result in substantial confusion for consumers, would fundamentally disrupt the workings of the public switched telephone network, and would harm universal service.”²¹⁸ Accordingly, we conclude that our rulemaking procedures combined with our public interest finding in the *CLEC Access Reform Order* support a decision to require an IXC to establish a physical connection or a through route via the acceptance of access service if such service is provided at rates that are just and reasonable in accordance with the Act.²¹⁹ In the *CLEC Access Reform Order*, the Commission found that competitive LEC access rates at or below the benchmark are presumptively reasonable.²²⁰ Therefore, we find that an IXC's refusal to accept competitive LEC access service at rates at or below the benchmark would run afoul of the second clause of section 201(a). This obligation may be enforced through a section 208 complaint before the Commission.²²¹

5. Z-Tel Petition for Waiver of Section 61.26(d)

62. On August 3, 2001, Z-Tel filed a Petition for Temporary Waiver of Commission Rule 61.26(d), the CLEC new markets rule, as applied to certain MSAs that Z-Tel was capable of serving as of

²¹⁵ 47 U.S.C. § 201(a).

²¹⁶ Although section 201(a) requires an opportunity for hearing, our previous use of notice and comment procedures to satisfy the section 201 hearing requirement was expressly confirmed by the U.S. Court of Appeals for the Third Circuit. *See Bell Telephone Co. v. FCC*, 503 F.2d 1250, 1265 (3rd Cir. 1974) (holding that section 201(a) permits procedures less formal and adversarial than an evidentiary hearing because, among other things, courts have come to favor rulemaking over adjudication for the formulation of new policy), *cert. denied*, 422 U.S. 1026 (1974). In the *Access Charge Further Notice*, the Commission explicitly sought comment on an IXC's obligations to accept or deliver traffic from or to a LEC and “whether any statutory or regulatory constraints prevent an IXC from declining a CLEC's access service.” *Access Charge Further Notice*, 14 FCC Rcd at 14341-42, paras. 241-42. In response to the *Access Charge Further Notice*, numerous parties commented on whether section 201(a) requires IXCs to accept access traffic. *See CLEC Access Reform Order*, 16 FCC Rcd at 9959, para. 91 (discussing the comments filed on this issue). Thus, the notice and comment procedures were satisfied in this case.

²¹⁷ *CLEC Access Reform Order*, 16 FCC Rcd at 9960, para 93 (explaining that “the public has come to value and expect the ubiquity of the nation's telecommunications network”).

²¹⁸ *Id.*

²¹⁹ 47 U.S.C. § 201(b).

²²⁰ *CLEC Access Reform Order*, 16 FCC Rcd at 9925, para. 3.

²²¹ 47 U.S.C. § 208(a).

the petition date.²²² Z-Tel requests that the rule be waived for three years to permit it to offer exchange access services in the specified MSAs pursuant to its filed interstate access tariff.²²³ Z-Tel argues that the public interest would be served if it were allowed to offer this service without requiring it to implement the costly software upgrades that it asserts would be necessary to enable Z-Tel to charge different access rates on an MSA basis.²²⁴

63. The arguments made by Z-Tel in support of its waiver request are identical to those raised in petitions seeking reconsideration of the CLEC new markets rule, and several parties urge the Commission to grant the relief sought by Z-Tel on an industry-wide basis, as requested in petitions for reconsideration.²²⁵ For example, other competitive LECs argue that it is technically difficult and expensive to comply with the CLEC new markets rule because existing billing systems must be modified to comply with section 61.26(d).²²⁶ Because the arguments made by Z-Tel and other parties in support of a waiver are identical to those considered and rejected here, we deny the petition for waiver.²²⁷ We also deny the petition for the separate reason that Z-Tel failed to demonstrate any special circumstances necessary to support a waiver of the Commission's rules.²²⁸ The fact that other parties have expressed similar industry-wide concerns in the context of the rulemaking proceeding suggests that Z-Tel's circumstances are not unique or special in any respect.²²⁹ For all these reasons, we deny Z-Tel's petition.

²²² See generally Z-Tel Waiver Petition. The petition was docketed and comments were filed on November 2, 2001. See Z-Tel Files Petition for Waiver of Commission Rule 61.26(d) Pertaining to CLEC Access Services, CCB/CPD File No. 01-19, Public Notice, 16 FCC Rcd 18652 (2001). A number of parties filed comments, oppositions, and reply comments. See Appendix C for a complete list of pleadings in this docket.

²²³ See Z-Tel Waiver Petition at 12. Throughout its petition, Z-Tel sometimes refers to "Commission Rule 61.29(d)," rather than 61.26(d). See, e.g., *id.* at 6. Because there is no rule 61.29(d), we assume that Z-Tel intended to reference 61.26(d) throughout its petition.

²²⁴ Z-Tel needed the software upgrade in order to charge the transitional benchmark rate in its existing markets and the competing incumbent LEC rate in its new markets. *Id.* at 8.

²²⁵ See ASCENT Waiver Comments at 5; Focal/Pac-West Waiver Comments at 4; ALTS Waiver Reply at 1-2. See also ASCENT Waiver Comments at 4 (stating that "[t]he precise issue raised by Z-Tel is presently before the Commission, having been raised by more than one party within the context of reconsideration petitions"); Sprint Waiver Reply at 2 (arguing that Z-Tel's request is a "petition for reconsideration masquerading as a waiver request").

²²⁶ See Focal/Pac-West Waiver Comments at 3; ALTS Waiver Reply at 3. We note that, at the time the petition for waiver was filed, Z-Tel estimated that the software modifications and upgrades would be available in mid-2002. *Id.* at 8-9. Given the amount of time that has passed since the petition was filed, we suspect that Z-Tel's request may be moot in any event.

²²⁷ See *supra* discussion section III.B (considering and rejecting arguments to reconsider the CLEC new markets rule).

²²⁸ See *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (holding that "a waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest"). See also *Industrial Broadcasting Co. v. FCC*, 437 F.2d 680 (D.C. Cir. 1970) (indicating the need for articulation of special circumstances beyond those considered during a regular rulemaking).

²²⁹ See ACSENT Waiver Comments at 3 (noting that the dilemma faced by Z-Tel will be faced by numerous competitive LECs).